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REPORTS OF CASES  
DETERMINED IN  
THE SUPREME COURT  
OF THE  
STATE OF CALIFORNIA.

CURTIS J. HILLYER,  
REPORTER.

Volume XXI.

*SECOND EDITION.*

WITH NOTES AND REFERENCES TO SUBSEQUENT DECISIONS.

By ROBERT DESTY,  
ATTORNEY AT LAW.

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**JUSTICES**  
**OF**  
**THE SUPREME COURT,**

**DURING THE TERM OF THESE REPORTS.**

---

**HON. STEPHEN J. FIELD..... CHIEF JUSTICE.**  
**HON. W. W. COPE..... } ASSOCIATE JUSTICES.**  
**HON. EDWARD NORTON..... }**





## CASES REPORTED.

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	Page.
Adams v. Woods.....	165
Allen, Whitney v.....	238
Alpangh, Hickman v.....	225
Bacigalluppi, Rowe v.....	633
Barry, Hubbard v.....	321
Baum v. Grigsby.....	172
Baum, Hoff v.....	130
Beasley, Schultz v.....	518
Beck, People v.....	385
Belencia, People v.....	544
Berreyesa v. Schultz.....	513
Blair v. Wallace.....	317
Blockley v. Fowler.....	326
Brannan, Hestres, Administrator, v.....	423
Brannigan, People v.....	337
Brown v. Cronise.....	386
Burton v. Lies.....	87
Butler, Fallon v.....	24
Byers, Montgomery v.....	107
Caler, Frisch v.....	71
California N. R. R. Co. v. Gould.....	254
Canfield v. Tobias.....	349
Cannovan, Keane v.....	291
Carlos Oliveres, In re.....	415
Carlton v. Conroy.....	170
Carpentier v. Grant.....	140
Carpenter, Heirs of Nieto v.....	455
Carpentier, City of Oakland v.....	642
City of Oakland v. Carpentier.....	642
Clark v. Lockwood.....	220
Clements, Hestres v.....	425
Coles v. Soulsby.....	47
Conroy, Carlton v.....	170
Cooper v. Peña.....	403
County of Sutter, Fall v.....	237
Covillaud, Lewis v.....	178
Craig, Rhodes v.....	419
Creighton v. Pragg.....	115
Cromartie, Donahue v.....	80
Cronise, Brown v.....	386
Cunningham, Playter v.....	229
De Soto, Hathaway v.....	191
Donahue v. Cromartie.....	80
Dutil v. Pacheco.....	438
Dutton v. Warschaner.....	609

	Page.
Fall v. County of Sutter.....	237
Fallon v. Butler.....	24
Fowler, Gross v.....	392
Fowler, Blookley v.....	326
Frink v. Murphy.....	108
Frisch v. Caler.....	71
Fulton, Goddard v.....	430
Gibbons v. Peralta.....	629
Gibbs, Savings and Loan Society v.....	595
Gleason, Mills v.....	274
Goddard v. Fulton.....	430
Gordon v. Wansey.....	77
Gould, California N. B. R. Co. v.....	254
Graham, People v.....	261
Grant, Carpentier v.....	140
Gregory v. Haynes.....	443
Griffin, Videau v.....	389
Grigsby, Baum v.....	172
Gross v. Fowler.....	392
Guy v. Hanly.....	397
Hanly, Guy v.....	397
Hart v. Robertson.....	346
Hartley, People v.....	585
Hathaway v. De Soto.....	191
Haynes, Gregory v.....	443
Hayes v. Shattuck.....	51
Heirs of Nieto v. Carpenter.....	455
Hestres v. Clements.....	425
Hestres v. Brannan.....	423
Hickman v. Alpaugh.....	225
Hidden v. Jordan.....	92
Hinckle, Van Winkle v.....	342
Hoff v. Baum.....	120
Holmes v. Horber.....	55
Horber, Holmes v.....	55
Hubbard v. Barry.....	321
Huber, Miliken v.....	166
Huffman v. San Joaquin County.....	426
Humiston v. Smith.....	129
Hutton v. Schumaker.....	453
Ihmels, Speyer v.....	280
In re Carlos Olivarez.....	415
Jackson, Pierce v.....	636
Jordan, Hidden v.....	92
Keane v. Cannovan.....	291
Keyes, Touchard v.....	202
Lawrence, People v.....	368
Lawton, San Francisco v.....	589
Lazar, Woodward v.....	448
Leese v. Sherwood.....	151
Lewis v. Rigney.....	268

	Page.
Lewis v. Covilland.....	178
Lies, Burton v.....	87
Lockwood, Clark v.....	220
Mahoney v. Van Winkle.....	552
Mahoney, Reese v.....	305
McCahill, Pierson v.....	122
McCarthy v. White.....	495
McCloud, Van Valkenburg v.....	330
McKinney v. Smith.....	374
McPike, Wells v.....	215
Middlemiss, Montgomery v.....	103
Miliken v. Huber.....	166
Mills v. Gleason.....	274
Montgomery v. Byers.....	107
Montgomery v. Middlemiss.....	103
Moses, White v. (No. 1).....	84
Moses, White v. (No. 2).....	43
Murphy, Frink v.....	103
Nieto, Heirs of v. Carpenter.....	455
Oakland v. Carpenter.....	642
Ocean Mining Co., Shaver v.....	45
O'Connell, Tewksbury v.....	60
O'Connell, Tevis v.....	512
Oliveres, Matter of.....	415
Oullahan v. Starbuck.....	413
Owens, Smith v.....	11
Pacheco, Dutil v.....	438
Pechand v. Riquet.....	76
Pefia, Cooper v.....	403
Pefia v. Vance.....	142
Peralta, Gibbons v.....	620
Pierson v. McCahill.....	122
Pierce v. Jackson.....	636
Pimental v. San Francisco.....	351
Pixley, San Francisco v.....	56
Playter v. Cunningham.....	229
Pragg, Creighton v.....	115
People v. Brannigan.....	337
People v. Beck.....	385
People v. Vice.....	344
People v. Vance.....	400
People v. Graham.....	261
People v. Lawrence.....	368
People v. Belencia.....	544
People v. Hartley.....	585
People ex rel. Frank v. San Francisco.....	668
Reese v. Mahoney.....	305
Rico v. Spence.....	504
Rigney, Lewis v.....	268
Riquet, Pechand v.....	76
Rhodes v. Craig.....	419

	Page.
Robertson, Hart v.....	346
Rowe v. Bacigalluppi.....	683
San Francisco v. Pixley.....	56
San Francisco, Pimental v.....	351
San Francisco, People ex rel. Frank v.....	668
San Francisco v. Lawton.....	589
San Joaquin County, Huffman v.....	426
Savings and Loan Society v. Gibb.....	595
Schumaker, Hutton v.....	453
Schultz, Berreyesa v.....	513
Schultz v. Beasley.....	513
Scott River Co., Shores v.....	135
Shattuck, Hayes v.....	51
Shaver v. Ocean Mining Co.....	45
Sherbourne v. Yuba County.....	113
Sherwood, Leese v.....	151
Shores v. Scott River Co.....	135
Soulsby, Coles v.....	47
Smith, Humiston v.....	129
Smith v. Owens.....	11
Smith, McKinney v.....	874
Spence, Rico v.....	504
Speyer v. Ihmels.....	280
Starbuck, Oullahan v.....	413
Stranahan, Table Mountain Tunnel Co. v.....	548
Table Mountain Tunnel Co. v. Stranahan.....	648
Tevis v. O'Connell.....	612
Tewksbury v. O'Connell.....	60
Tobias, Canfield v.....	349
Touchard v. Keyes.....	202
Vance, Peña v.....	142
Vance, People v.....	400
Van Valkenburg v. McCloud.....	330
Van Winkle v. Hinckle.....	342
Van Winkle, Mahoney v.....	552
Vice, People v.....	344
Videau v. Griffin.....	389
Wallace, Blair v.....	317
Wansey, Gordon v.....	77
Warschauer, Wheelock v.....	305
Warschauer, Dutton v.....	609
Wells v. McPike.....	215
Williams v. Young.....	227
Wheelock v. Warschauer.....	309
White, McCarthy v.....	495
White v. Moses (No. 1).....	34
White v. Moses (No. 2).....	43
Whitney v. Allen.....	233
Woods, Adams v.....	165
Woodward v. Lazar.....	448
Young, Williams v.....	227
Yuba County, Sherbourne v.....	113

OCTOBER TERM, 1862.



REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT,

OCTOBER TERM, 1862.

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SMITH v. OWENS.

<sup>1</sup> **NOTE GIVEN FOR DEBT, EFFECT OF.**—A note given in consideration of an antecedent indebtedness does not *per se* discharge the debt. In the absence of an agreement to the contrary, the only effect is to suspend the remedy until the maturity of the note.

**AGREEMENT OF COMPOSITION MUST BE SPECIALLY PLEADED.**—Where, to an action upon a promissory note, an agreement of composition between the debtor and his creditors, including the plaintiff, is relied upon as a defense, such agreement must be specially pleaded, and cannot be considered under a plea of accord and satisfaction by the giving of new notes.

<sup>2</sup> **SPECIAL DEFENSE—OMISSION TO PLEAD, NOT CURED BY EVIDENCE.**—Where a defense is required to be pleaded specially, the omission to plead it is not cured by the introduction of evidence in support of it on the trial without objection on the part of the plaintiff.

**COMPOSITION BY CREDITORS—NOTE VOID FOR FRAUD.**—If the creditors of a failing debtor agree between themselves, with the assent of the debtor, to a composition of their respective debts, and to receive in lieu thereof securities of a certain character, and one of the creditors subsequently obtains from the debtor new notes of a character more favorable to the creditor than those provided for in the composition agreement, such new notes are void for fraud, not only as to the other creditors, but as to the assenting debtor.

---

<sup>1</sup> See *Welch v. Allington*, 23 Cal. 322; *Griffith v. Grogan*, 12 Cal. 317; *Higgins v. Wortell*, 18 Cal. 333; *Mitchell v. Hockett*, 25 Cal. 542.

<sup>2</sup> Cited as authority in *McComb v. Reed*, 28 Cal. 284; *McKenzie v. Dickenson*, April T. 1868, (not reported.)

## [12] \*APPEAL from the Twelfth Judicial District.

The action was brought January 20th, 1858, by L. E. P. Smith and others, to recover \$7,271 35, the full amount of four promissory notes of P. H. Owens & P. A. Owens, defendants, including principal and interest to that date. The answer is, substantially, that at the date of the action, the plaintiffs were not the holders and owners of the notes sued on; that the defendants were not indebted thereon, in any sum whatever; and that, after the notes had become payable, the defendants made and delivered to the plaintiffs, who accepted them, six other promissory notes (set forth) in full extinguishment, satisfaction, and discharge of the four notes sued on, and of one other note not sued on, of which six new notes one had become payable and been paid before suit brought.

The case was referred to a referee to try the issues and report a judgment. In due course he reported a judgment for the plaintiffs for the sum of \$7,477 95, being the full amount claimed in the complaint, with interest, less \$486 56 balance of a payment made by the defendants, and by him applied on the old note not sued on.

His finding of facts was as follows:

"1st. At the respective times named in the amended complaint, the defendants made and delivered to the plaintiffs the four promissory notes, copies of which are contained in said complaint, and which notes are now held by the plaintiffs.

"2d. On the first day of September, 1856, the said defendants made and delivered to the plaintiffs a certain other promissory note, in words and figures following, viz.:

" '\$1,617 33.                      SAN FRANCISCO, Sept. 1, 1856.

' Six months after date we promise to pay to the order of Lewis E. P. Smith & Co., sixteen hundred seventeen 33-100 dollars, at their office in New York, value received.

(Signed)                      P. H. & P. A. OWENS."

"3d. That on the third day of February, A. D. 1857, at the city of New York, State of New York, the defendants made and delivered to the plaintiffs their six several promissory



notes, all dated on that day, which notes were for the amounts, and were \*indorsed and payable as set forth [13] in the defendants' answer to the amended complaint.

"4th. That said six several promissory notes last referred to, were made and delivered by the defendants to the plaintiffs, and by the plaintiffs accepted and received for and on account of the four promissory notes described in the complaint, together with the note above described, dated September 1st, 1856; but said six promissory notes were not delivered or accepted as full extinguishment, satisfaction, or discharge of said five former notes then outstanding in plaintiffs' hands.

"5th. On the ninth day of June, 1857, the defendants paid to the plaintiffs the sum of \$2,139 56, in satisfaction and discharge of the said note, dated February 3d, 1857, and payable in four months after date, and indorsed by John Owens, and said note was delivered up and canceled.

"6th. On the trial before the referee, the plaintiffs' counsel tendered to the defendants' counsel the five other promissory notes, dated February 3d, 1857, and above referred to, and consented that they be canceled; the same being on file in this cause as exhibits annexed to depositions taken on the part of the defendants, the said five notes remaining unpaid.

"7th. That at the time of the commencement of the present action, that is, immediately preceding the same, (the defendants not having appropriated or applied the payment of said sum of \$2,139 56 to any one of the five old notes first above referred to,) the plaintiffs applied the said sum in full payment of said note, dated September 1st, 1856, and the balance, after paying said note, to the general credit of the defendants.

"8th. The plaintiffs' counsel also surrendered on the trial to the referee the said note, dated September 1st, 1856, and consented that the same be canceled or delivered to the defendants as paid; the same being on file and annexed to the depositions taken in this case on the part of the defendants.

"9th. That the rate of interest in the State of New York, where the said promissory notes were payable, is and was at the times aforesaid, seven per centum per annum on promissory notes after the maturity of the same.

\*"10th. That there remains due and unpaid on the [14] said promissory notes described in the said complaint,

after deducting therefrom the balance referred to in the seventh finding above, the sum of \$6,471 31 principal, and \$1,006 64 interest, to this date, making in all the sum of \$7,477 95."

It was shown by evidence, that in December, 1856, the defendants were indebted to various persons and firms in New York, the aggregate amount of their indebtedness being over \$24,000, of which \$8,363 11 was due the plaintiffs.

This indebtedness to the plaintiffs was in the form of promissory notes, five in number, of which but two were due in December, 1856, and the first four are those now in suit. The indebtedness to the other creditors was in the form of notes or book accounts.

The defendants could not meet their indebtedness, and on December 17th, 1856, the creditors, including the plaintiffs, entered into the written agreement which is set forth in the opinion.

The defendants became parties to this agreement between their creditors; and as between them and their other creditors (except the plaintiffs) the agreement was substantially carried out.

With the plaintiffs a subsequent arrangement was made by which they received defendants' notes at four and six months, indorsed by John Owens, for one-half their debt, and defendants' notes without indorsement, at two, three, and four years, for the other half of the debt, the whole secured by a policy of insurance on the life of P. H. Owens.

Of these new notes one was paid at maturity, and the others were in the hands of the plaintiffs at the time of the commencement of the action, and were not surrendered by them until during the progress of the trial before the referee.

On the report of the referee plaintiffs had judgment; defendants moved for a new trial which was denied, and from this order and the judgment the appeal is taken by them.

An opinion affirming the judgment was delivered by Justice Cope, the other Justices concurring, at the April Term of 1861, and at the same term, on application of defendants, a rehearing was granted, and the case was reargued and submitted anew at the following term.

\**Eugene Casserly*, for Appellants.

[15]

I. The agreement of December 17th, 1856, operated *per se* as a defense to the action.

The leading English case of *Good v. Cheeseman*, (2 Barn. & Ad. 328, 333-345, by all the Judges,) is precisely in point. (See also *Cartwright v. Moore*, 3 B. & Ad. 703, 704.)

The agreement in the present case is not a composition, properly so called; but upon this point, the doctrine of compositions between an insolvent debtor and several creditors is applicable. (*Steinman v. Magnus*, 11 East. 390; 1 Smith's Leading Cases, 149b.)

It is not material whether or not all the creditors of appellants were parties to the agreement. All were not required to be parties, either by its terms or by the law. Those who became parties were bound. (See *Eaton v. Lincoln*, 13 Mass. 424; *Norman v. Thompson*, 4 Eng. Exch. [W. H. & Gordon] \*755; *Wood v. Roberts*, 2 Stark. 368, 369, 417; *Good v. Cheeseman*, above cited.)

The doctrine here asserted is no more than this, that if two or any larger number of a man's creditors should come together, and each should agree so and so, provided all the rest should do the same, the parties would be bound, though they were but a portion of the whole body of the creditors.

The agreement was binding, not only on the creditors (including the respondents) who signed it, but also upon the appellants, who, by their acts and their assent, express and implied, became parties to it.

Compositions and compromises, and agreements in that nature, between a debtor and his creditors are usually in writing, for convenience in the making and the proof, and for greater exactness; and occasionally under seal, for more solemnity. But when the original indebtedness rests in simple contract, as promissory notes, book accounts, etc., writing is not essential, and the agreement may be made and proved by parol, the acts of the parties, proof of assent, express or implied, like any other simple contract not within the Statute of Frauds, or not depending for validity on a seal, like the technical release from a single creditor

[16] \*to his debtor.\* (See *Good v. Cheeseman* and *Eaton v. Lincoln*, above cited.)

The facts in this case are much stronger than those in *Good v. Cheeseman*, in which all the Judges held the debtor, though he did not sign, equally a party with the four creditors who signed the agreement.

The respondents, and the other creditors who signed the agreement, and the appellants, being thus bound by it, it went into legal operation as between all the parties, (including the appellants and the respondents,) and its legal operation as between the appellants and respondents was, immediately and without further performance by the former, to substitute an entirely new contract for, and in full satisfaction and extinguishment of, the old indebtedness on the old notes.

The modes of compromise between creditor and debtor are various; but they will all be found to come under one of the following classes:

1st. When the compromise is between a single creditor and a single debtor. This mode depends upon doctrines entirely peculiar to itself. The rule in respect of it is: that payment of part of a debt past due, or the acceptance of security of equal degree and not affording a better remedy, cannot be set up as a defense to an action for the original debt. The leading case is *Cumber v. Wane*, 1 Strange, 426—1 Smith's L. C. 146. The doctrine of that case has never been satisfactory; and the history of the decisions since, especially in modern times, is the history of a continuous struggle of the Courts to take cases out of the operation of it, and to modify, limit, and even overthrow its authority, down to *Sibree v. Tripp*, 15 M. & Welsby, 23, in which, after full consideration, the English Court of Exchequer may be said to have greatly shaken, if not substantially overruled it.

For the authorities, more or less, against the doctrine of *Cumber v. Wane*, as well where the original indebtedness was unliquidated (being the first modification effected by the Courts) as where it was liquidated—see 1 Smith's L. C. 148, 149, 149a; and Notes of Hare & Wallace, 447-449; 2 Parsons on Cont. 129-131, and cases in notes *u*, *v*, *w*, *x*, *y*;

[17] *Johnson v. Brannan*, 5 Johns. 268, \*271; *Kellogg v.*

*Richards*, 14 Wend. 116; *Brooks v. White*, 2 Met. 283; *Cooper v. Parker*, 14 C. B. [78 E. C. L.] 118, 121.

It is needless to remark that this mode of compromise may always be made by release under seal; the seal supplying the necessity of a sufficient consideration, which is usually the point of difficulty.

2d. Where several creditors unite with their debtor in a composition or agreement for compromise, which, by its terms, express or implied, is conditional, so that unless the debtor performs all that is required of him, the compromise is void and the creditors are remitted to all their rights on the original indebtedness. In such cases the debtor, if sued on the original debt, can defend on the agreement of compromise or composition only by showing complete performance of it on his part. To this class of cases belong the following—in all of which, by the express or implied terms of the agreement, the old debt was to be released only upon payment or other performance of the agreement by the debtor, or upon some other condition, as that all or a certain number should sign: *Penniman v. Elliott*, 27 Barb. 315—though the reporter presses the rule beyond the facts and decision of the case; and see 1 E. D. Smith, 68; *Leake v. Young*, 36 E. L. E. 188, 190, 191, 193; *Rosling v. Muggeridge*, 16 M. & Wels. 181; *Paulin v. Kaighn*, 3 Dutch. 503, 513.

3d. A third mode of settlement between several creditors and their debtor is, as in the present case, where they become parties to a new agreement, which by its terms or legal effect otherwise, is at once substituted for and in full extinguishment of the original contract of indebtedness. In every such case, the previous debt being extinguished and the remedy of the creditor on it gone, his recourse is on the new agreement for any breach of it by the debtor.

There is, doubtless, some confusion and conflict in the cases; in part only apparent, and in part the result of not sufficiently observing the difference in principle between this third class of agreements and the other two. But the doctrine just stated is one of the oldest in the law, and is sustained by a great weight of authority and a strength of principle that is overwhelming.

\*The best considered modern case on the subject [18]

is *Good v. Cheeseman*, which in its facts is abundantly in point.

It is laid down in *Reniger v. Fogossa*, 1 Plowd. 5a, that an agreement which is effectual as a defense is such an agreement as is executed and satisfied "with a recompense in fact," "or with an action or other remedy to execute it and to recover a recompense;" thus recognizing the principle. (See also *Id.* 6, 5; *Cartwright v. Cooke*, 3 Barn. & Ad. 701.)

In *Boyd v. Hind*, 40 Eng. Law & Eq. 428, the case of *Good v. Cheeseman* is discussed with marked approbation by the Court; and the important distinction is pointed out between an agreement in which several creditors unite and one made between a single creditor and his debtor. The Court says (p. 431:)

"The law with respect to defenses founded on compositions between debtors and his creditors appears not to have been distinctly defined until the case of *Good v. Cheeseman*. It used to be sometimes laid down, that a right of action once vested could only be divested by a release, or by accord and satisfaction; but since the decision in that case, the law has been regarded as settled that a composition agreement by several creditors, although by parol so as to be incapable of operating as a release, and although unexecuted so as not to amount in strictness to a satisfaction, would be a good answer to an action by the creditor for the original debt, if he accepted the new agreement in satisfaction thereof, and that for such an agreement there is a good consideration to each creditor—namely, the undertaking by the other compromising creditors to give up a part of their claim. But no such agreement can operate as a defense if made merely between the debtor and a single creditor. The other creditors, or some of them, must also join in the agreement with the debtor and with each other; for otherwise, it would be a bare contract to accept a less sum in satisfaction of a greater, which would be invalid by reason of want of consideration for relinquishing the residue."

To the same effect are *Evans v. Powell*, 1 Eng. Exch., W. H. G., \*601, \*607-608; *Wood v. Roberts*, 2 Stark. 368, 369—approved and explained in *Boyd v. Hind*, 40 Eng. Law & Eq. 432. In *Cockshott v. Bennett*, 2 T. R. 763, it was held by

\*Ashurst, J., that, by the composition in that case between a debtor and his creditors, the original debt was "annihilated." [19]

The doctrine and the reason of it are applied or approved in several American cases.

*Goodrich v. Stanley*, 24 Conn. 620, 621, discussing the principle and the authorities.

*Coit v. Houston*, 3 Johns. Cases, \*246, per Thompson, C. J.

*Billings v. Vanderbeck*, 23 Barb. 546, Gen. T., held, "An accord unperformed consisting of mutual promises, and thus having a new consideration, is binding upon the parties, and an action will lie for a breach of it." (Pages 552, 523, citing *Cartwright v. Cook*, 3 Barn. & Ad. 701, etc.; see also the agreement in the case, p. 547; *Kinsler v. Pope*, 5 Stroth. 128; *Paulin v. Kaighn*, 3 Dutch., N. J., 503, 513; *Brown v. Stackpole*, 9 N. H. 478; 2 Parsons on Cont. 194; 1 Smith's L. C. \*150; 2 Greenl. Evid. sec. 31, notes, 32; Story on Cont. sec. 982; Byles on Bills, \*183, note d; *Houghtaling v. Banden*, 25 Barb. 21, 22; *Campbell v. Jones*, 6 T. R. 570-573; 1 Tidd. Prac. 2d Ed. \*440.)

Such being the effect and operation of the agreement of December 17th, 1856, between the creditors, including the respondents and the appellants, it was not in the power of the respondents, without the consent of all the other creditors, by any private understanding with the appellants, to abandon the agreement, or in any manner so to vary it as to have the old notes remain in the hands of the respondents and remit them to their original rights upon them; and all the testimony to that point is immaterial and of no effect. The retention of the old notes, with or without the consent of the appellants, by the respondents, was a breach of the agreement, and the attempt to enforce them in the present suit is a fraud upon the other creditors.

Nothing is better settled in law than that in compositions or agreements in that nature between a debtor and his creditors perfect good faith is exacted from all the parties to each other. The attempt of one creditor to obtain an undue advantage for himself over the rest, with or without the consent of the debtor, is a fraud which the law will never allow to succeed. And it is not material by whom the question is

[20] brought before the Court; whether on the \*complaint of one or more of the other creditors or upon the showing of the debtor himself in a suit by the unconscionable creditor, which latter is the usual mode.

So far is this principle carried, that such a defense may always and under all circumstances be set up by the debtor in a suit brought by the unjust creditor upon any security thus improperly obtained by him, whether of the debtor or of a third party; and money so paid may be recovered back from the creditor. (1 Story Eq. Jurisp. secs. 378, 379, and cases cited; *Good v. Cheeseman*, 2 B. & Ad. 328, 333-335, and cases cited *ante*; *Breck v. Cole*, 4 Sandf. 79, and full discussion of the cases, 82-88; *Russell v. Rodgers*, 15 Wend. 354, 355, and cases cited and discussed; *Stock v. Mawson*, 1 Bos. & Pull. 286—money recovered back from the creditor; *Steinman v. Magus*, 11 East. 390.)

II. If it shall be considered by the Court that the legal effect of the agreement of December 17th, 1856, was not as contended in the preceding point, then, at all events, the conduct of the respondents, taken in connection with the agreement and the acts of the other creditors under it, in accepting the new notes from the appellants and enforcing and receiving payment of the first of them after default made upon them, constituted a defense to this action upon the old notes.

III. The new notes in the respondents' hands being securities under the agreement of December, 1856, and they having retained them and having elected (after default made by the appellants in the payment of the first of the new notes) to look to them as their security and enforce payment, they could not afterwards fall back upon the old notes.

Plaintiffs accepted the new notes as an entirety in the first place under the agreement of December, 1856. Whether they then accepted them conditionally or not, they afterwards affirmed them by collecting the first of them after maturity; and they affirmed them as an entirety and unconditionally. They could not do otherwise. In the nature of the case, they had either to affirm or reject *in toto*. (*Conkling v. King*, 10 Barb. 372, 376, and cases cited—this case affirmed in Court of Appeals, April, 1854; 4 Clinton Dig. 192, sec. 16; *Hunt v. Silk*, 5 East. 449.)



\*To hold otherwise would be most unjust to the other [21] creditors, and contrary to the doctrine of *Mackenzie v. Mackenzie*, 16 Ves., Jr., \*372, and of 2 Spence, \*354.

The tendency of the latter cases is in favor of the presumption of law, that where new notes are given before the old notes are due, and in exchange for them, and especially where the security of a third person is given, it is in satisfaction unconditionally. (*Arnold v. Camp*, 12 Johns. 409, \*410-411, and cases cited; *Frisbie v. Larned*, 24 Wend. 450, 451, 454; *Boyd v. Hitchcock*, 20 Johns. 76; *Brooks v. White*, 2 Met. 283-288.) As to payments before the day. (*Pinnel's Case*, 5 Coke, 117a; *Brooks v. White*, Met. 286, 287; *Page v. McCrea*, 1 Wend. \*164; *St. John v. Purdy*, 1 Sand. 9-11.) *A fortiori* in a case like the present.

IV. The referee's finding of facts does not support his conclusions of law.

The fourth finding evidently proceeds upon the idea that the agreement between the appellants and their creditors was not a defense. The grounds of this are not stated; but they must be either that the agreement was not carried out by the appellants, by the giving and payment of the new notes, and so became null and void as to all the creditors, or that, by some private understanding between the appellants and respondents, not assented to by the other creditors, the agreement was abandoned and a special arrangement entered into by which the old notes were left in the hands of respondents, who were remitted to all their original rights upon them. Neither ground can be sustained under the authorities hereinbefore cited.

It is held, that in assumpsit for goods sold it is a good plea in bar that the defendant, being the payee of the note of a third person, indorsed it to the plaintiff, who "received and accepted it for and account of" the debt; being the precise language of this finding. (*Kearslake v. Morgan*, 5 T. R. 513, 514, 518; 1 Bacon Abr. 56, 57, "Accord," A; *Thomas v. Heathorn*, 2 Barn. & C. 477.)

Now, it would seem that whatever is a good defense, if pleaded, must equally—and even *a fortiori*—be so if found as a fact by a referee or by the verdict of a jury. Hence, it follows that the first part of this fourth finding is in direct

[22] contradiction of the latter \*part; that one part destroys the other, leaving the whole a nullity. If this be so, there is nothing to support the referee's decision as to his conclusions of law that the appellants were indebted upon the old notes.

*Holladay & Carey, for Respondents.*

I. The agreement of December, 1856, is not set up in the answer, and no defense can be predicated upon it. The appellants had their option to rely upon this agreement as a composition, or upon the new notes, and they elected to plead, as a bar to this action, the new notes.

II. It is everywhere admitted that the extinguishment of one cause of action by the substitution of another of the same degree, can only be by way of accord and satisfaction which requires a distinct and executed agreement between the parties, and cannot be implied by the law in the absence of such an agreement.

In *Clark v. Mundol*, 1 Salk. 124, it was held, "that a bill should never go in discharge of a precedent debt, except it be a part of the contract that it should be so."

The rule thus laid down, which has never been disputed in England, is well illustrated by the case of *Tbby v. Barber*, 9 Johns. 310, and is followed in most of the States of this country, where it is generally admitted that taking a negotiable instrument made by a debtor, or by a third person, on account of a preëxisting debt, does not imply a discharge or extinguishment of the demand for which it is taken, nor confine the creditor to proceeding in the new cause of action, unless such was the understanding of the parties. The existence of such an agreement is, in general, a question for the jury, although it would seem to be the duty of the Court to instruct them, that the mere fact of accepting such an instrument as payment, without more, will not sustain a finding, that it was accepted as satisfaction. But for a full discussion of this whole matter see 2 Ames' Leading Cases, 3d ed., title, Note or Bill taken for Debt, 162-179, and cases there cited; also 12 Cal. 317.

III. The agreement of December, 1856, even if it could be considered under the pleadings, constitutes no defense, for

the reason that it was not carried out, but was ignored and abandoned. The \*new notes were not given in [23] pursuance of the agreement, but in direct opposition to its terms.

CORP, J. delivered the opinion of the Court—NORTON, J. concurring.

A rehearing was granted in this case for the purpose of considering more fully the matters relied upon by way of defense. After giving these matters the consideration which their importance deserves, we see no reason for a conclusion different from that previously attained. The action is upon four promissory notes, and it is alleged in defense, that before the action was commenced the defendants executed to the plaintiffs certain other notes, in satisfaction of the notes in suit. This is the only defense set up, and the finding of the referee, that the new notes, though given on account of the old, were not received in satisfaction, is undoubtedly correct.

We have repeatedly held, that a note given in consideration of an antecedent indebtedness does not *per se* discharge the debt; and that in the absence of an agreement to the contrary, the only effect is to suspend the remedy until the maturity of the note. There was no agreement upon the subject in this case, and the only difficulty that suggests itself grows out of a paper executed in the city of New York, which reads as follows: "We, the undersigned, hereby agree to extend the time of payment of the indebtedness of Messrs. P. H. & P. A. Owens, ship-chandlers of San Francisco, to us, so that the aggregate of their outstanding debts, or notes, shall become due in four equal payments of six, twelve, eighteen, and twenty-four months from date, with interest at seven per cent. per annum, and to accept their notes to that effect in exchange for those now held by us." This paper is signed by various parties, including the plaintiffs, and, except as to the latter, appears to have been substantially carried out by an exchange of notes upon the basis therein mentioned. In respect to the latter, the proof shows that it was not intended to be acted upon, and the notes subsequently executed were given, not only in disregard of, but in direct repugnance to its terms. This being the case, the paper and the notes are to be re-

garded as separate transactions, and upon the question of satisfaction the paper has no bearing or relevancy. It [24] is con-\*tended that the paper itself operates as a defense, and the counsel for the defendants has placed on file an able argument in support of this view. The argument is met, however, by the fact that this defense is not pleaded, and the failure in that respect precludes the defendants from taking advantage of it. The case is that of a compromise between debtors in failing circumstances and their creditors, and counsel is correct in saying that in such matters the law requires the utmost good faith. The parties are held to a strict and literal compliance with their agreement, and secret arrangements securing advantages to particular creditors are absolutely void. And they are not only void as to other creditors, but even as against the assenting debtor, and the Courts have uniformly refused to enforce them. (Story's Eq. sec. 379.) The notes were executed in fraud of the compromise, and tested by the agreement they are void; but whether void or valid the result is the same. In either case the plaintiffs are entitled to recover, for there is no evidence to sustain the answer, and no foundation for a defense upon the agreement. It is true, the agreement was given in evidence without objection, but the case must be determined upon the issue presented in the pleadings. The only question is whether the notes were received in satisfaction, and there is no doubt that the referee arrived at the proper conclusion. The judgment is affirmed.

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### FALLON v. BUTLER *et al.*, EXECUTORS, ETC.

FORECLOSURE OF MORTGAGE AGAINST ESTATE OF DECEASED PERSON.—An action may be maintained in the District Court against an executor or administrator, to foreclose a mortgage upon real estate executed by his testator or intestate, although the debt secured by the mortgage has been presented as a claim to the

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<sup>1</sup> Affirmed as to jurisdiction in *Pechaud v. Riquet*, post 76. Cited as authority in *Willis v. Farley*, 24 Cal. 498; *Matter of Estate of Orr*, 29 Cal. 104; *Brown v. Orr*, Id. 123; and see *Hentsch v. Porter*, 10 Cal. 559.

executor or administrator and allowed by him, and also by the Probate Judge of the county, where the only object of the action is to reach the property mortgaged and subject it to sale, and have the proceeds applied to the payment of the debt secured, and a judgment is not asked against the general estate of the deceased for the debt or any part of it.

\* PROBATE SALES, TO WHAT STATUTE APPLIES.—\*The provision of the act regulating the settlement of the estates of deceased persons, declaring that no sale of any property of an estate shall be valid unless made upon an order of the Probate Court, applies only to sales by executors and administrators. It has no reference to judicial sales under the decrees of the District Courts, nor to sales in pursuance of testamentary authority.

\* "CLAIMS" DEFINED.—The term "claims," as used in the act, does not embrace mortgage liens, but has reference only to such debts or demands against the decedent as might have been enforced against him in his lifetime by personal actions for the recovery of money, and upon which only a money judgment could have been rendered.

APPEAL from the Fourth Judicial District. The facts are stated in the opinion.

*Hoge & Wilson*, for Appellants, cited *Ellissen v. Halleck*, 6 Cal. 386; *Falkner v. Folsom's Executors*, Id. 412; Act to regulate the Settlement of the Estates of Deceased Persons, secs. 133, 134, 136, 140, and 148.

*Delos Lake*, for Respondent.

The only question in the case is, as to the right of a mortgagee to maintain an action in a Court of Equity to foreclose a mortgage, the mortgagor being dead; or, in other words, whether Probate Courts are vested by statute with exclusive jurisdiction to enforce such mortgage.

The only doubt or difficulty there is in the case arises from the decisions in the two cases of *Ellissen v. Halleck*, 6 Cal. 386, and *Falkner v. Folsom's Executors*, Id. 412.

But we submit, that these cases, if not wholly overruled, have been so qualified and shaken by the later cases of *Belloc v. Rogers*, 9 Cal. 125; *Carr v. Caldwell*, 10 Id. 380; *Hentsch v. Porter*, Id. 555, as to leave us at liberty to appeal to the statute itself.

\* As to sales by executors, see *Belloc v. Rogers*, 9 Cal. 148; *Payne v. Payne*, 18 Cal. 302; *Conwell v. Buckalew*, 14 Cal. 642; *White v. Moses*, post 44; *Laroc v. Casaneuava*, 30 Cal. 569; *Norris v. Harris*, 15 Cal. 256; *Sichel v. Carrillo*, 42 Cal. 505; *Pitts v. Shipley*, 46 Cal. 158; *Hibernia S. and L. Soc. v. Hayes*, 56 Cal. 306.

\* As to the term "claim" and what it includes, commented on and doubted in *Ellis v. Polhemus*, 27 Cal. 354; and see *Gray v. Palmer*, 9 Cal. 636; *Carr v. Caldwell*, 10 Cal. 385; *Pico v. De la Guerra*, 18 Cal. 427. As to payment of mortgage debt out of general estate, approved in *Willis v. Farley*, 24 Cal. 498; *Estate of McCausland*, 52 Cal. 577; *Myers v. Reinstein*, 67 Cal. 92. See 2 Nev. 332, 333, 338.

The whole question hinges on the proper meaning of the term "claim against an estate," as used in section one hundred and thirty-six of the Probate Act and the preceding sections, and whether a naked mortgage lien is such a claim against the estate of a deceased person.

We think it clear that under the statute, whatever was a personal debt or liability of the decedent becomes by his death a "claim," against his estate, and that it is only [26] such claims or debts \*as are enforceable against the decedent in his lifetime by ordinary personal actions for the recovery of money that are required by law to be presented to the executor or administrator for allowance, and upon which by section one hundred and thirty-six no action can be maintained.

All such claims, if allowed voluntarily, become acknowledged debts of the estate; i. e., debts of the decedent, and are to be paid in due course of administration.

In case a claim is rejected, a suit may be maintained against the executor or administrator, but a recovery in such an action has not the ordinary force or effect of a judgment. It only operates as a forced allowance, and is still to be paid in due course of administration. (Sec. 140.)

Hence it will be seen, that in no case can a claim against the estate be collected by action. It can only be established and can only be enforced in the Probate Court in due course of administration.

The object sought to be attained in this action is to subject the lands mortgaged to a sale for the satisfaction of the mortgage debt. No judgment or decree is asked to bind the estate of the decedent, nor for the payment of any moneys whatever out of the estate. The indebtedness is alleged it is true, but only for the purpose of showing a valid consideration for the mortgage, and in order that it may be judicially determined how much of the money realized on a sale the mortgagee shall be entitled to receive.

It is to be observed, that no provision is made by the statute for subjecting mortgaged premises to sale by the Probate Court for the purpose of satisfying the mortgage.

The cases in which sales of real estate by executors are authorized are confined to those where the personal property

is insufficient to pay all the debts and charges of administration, (sec. 154,) and where it is necessary for the purpose of paying legacies, (sec. 176.)

The one hundred and eighty-sixth section provides, that when any sale is made by an executor or administrator, "pursuant to the provisions of this chapter, of land subject to any mortgage or lien which is a valid claim against the estate of the deceased, the purchase money shall be applied after paying the necessary expenses of the sale, first, to the payment and satisfaction of the mortgage, and the residue in due course of administration."

\*This section does not authorize a sale of lands by [27] executors or administrators for the sole purpose of paying off and discharging a mortgage on the identical lands sold, but in case a sale shall be necessary and is made for the purpose of paying debts or legacies, then the purchase money is to be applied, in the first place, to pay off and satisfy the mortgage, but only in cases where the mortgage debt is "a valid claim against the estate of the deceased," and only the residue of the money arising from the sale is to be disposed of "in due course of administration."

It would seem, therefore, that in case of a sale of real estate by executors or administrators, which was incumbered by a mortgage, unless the mortgage debt was a personal claim against the decedent in his lifetime, and therefore a valid claim against his estate on his death, such sale must be made subject to the mortgage, and in such case the holder of the mortgage must resort to the ordinary remedy by action to foreclose the equity of redemption.

But whether this be so or not, it is obvious that no sale can be made by executors or administrators for the mere purpose of satisfying a mortgage made by the decedent, unless there was a personal liability on the part of the mortgagor to pay the mortgage debt, which liability became on his death a claim against the general estate.

In the absence of any statute regulating foreclosure actions, the ordinary decree in the case would be for a sale of the mortgaged premises and foreclosing the equity of redemption of the parties to the action.

By our statute the Court may make a decree, that the party

personally liable shall pay any deficiency. By a recent statute it is made imperative to take a personal decree for the deficiency, and failing to do so would probably be a release of the personal liability.

I refer to these statutes merely to show that without some such provision there would not be the shadow of a pretense for calling a foreclosure suit an action on a claim against an estate of a deceased person who should happen to have been a mortgagor.

But how does it become any more a claim because a Court of Equity may in a proper case include in its decree a direction that the mortgagor who is personally liable shall pay the deficiency?

[28] \*If the appellants' proposition is correct, to what result does it lead? If their construction of the statute is the true one, then it must hold good in all cases, because the statute makes no exceptions. And the length and breadth of the rule must be, that no action can be maintained for the foreclosure of a mortgage in a case where the mortgagor is not living; nor where the equity of redemption was owned by a decedent at the time of his death by purchase from a mortgagor; nor in case of a naked dry mortgage with no personal liability of any one like the case of *Whitney v. Buckman*, 13 Cal. 537.

Thus, in case a person after making a mortgage, conveys the equity of redemption and then dies, no action can be maintained to foreclose the mortgage, because the representative of the deceased mortgagor can only be proceeded against in the Probate Court.

Or, A dies, leaving lands incumbered by a mortgage made by his grantor, the mortgagee cannot foreclose his mortgage in equity, notwithstanding the fact that neither A nor his estate was ever liable for the mortgage debt.

Take another case: A makes a mortgage to secure the debt of B, and dies. The mortgagee cannot foreclose his mortgage in equity, although there never was any liability on the part of the mortgagor, either legally or equitably, to pay the debt.

That it was not the intention of the framers of the statute to work such mischief, there can be no doubt.



With all proper deference to the Judges who decided *Ellisen v. Halleck*, every lawyer knows that the gist of an action to foreclose a mortgage, is to foreclose or cut off the equity of redemption. By our statute this is done by a sale; without a statute it would be by a strict foreclosure. In either case it is a suit *in rem*.

We do not seek to collect the debt out of the estate. We ask no decree for any deficiency. It is therefore practically the case of a dry mortgage without personal liability.

FIELD, C. J. delivered the opinion of the Court—COPE, J. and NORTON, J. concurring.

This is an action for the foreclosure of a mortgage executed on the twenty-seventh of February, 1856, by David C. Broderick, late \*of the city of San Francisco, upon [29] certain real property situated within that city, to secure his promissory note of the same date for ten thousand dollars, payable in twelve months, with interest. Broderick died on the sixteenth of September, 1859, and the action is brought against the executors of his last will and testament, and parties claiming some interest in the mortgaged premises as devisees, legatees, purchasers, or otherwise, subsequent to the lien of the mortgage. The complaint alleges the probate of the will, and the issuance of letters testamentary to the defendants, Butler and McGlynn, the executors named therein; the presentation of the promissory note, verified as required by statute, to them, as such executors, for the approval and allowance as a claim against the estate of the deceased, and its approval and allowance by them, and subsequently by the Probate Judge of the county; and prays for the usual decree for the sale of the premises, and the application of the proceeds to the payment of the amount found due upon the note for principal and interest, and for the costs and per centage stipulated. There is no prayer for judgment or execution for any deficiency which may remain after the application of the proceeds of the sale. The plaintiff obtained a decree pursuant to his prayer.

The objection taken by the appellants is to the jurisdiction of the District Court to entertain the action. It is founded upon certain provisions of the "Act regulating the Settlement

of the Estates of Deceased Persons," and the decisions of this Court in *Ellissen v. Halleck*, 6 Cal. 386, and *Falkner v. Folsom's Executors*, Id. 412.

The provisions of the act referred to are those which declare that no sale of any property of an estate shall be valid unless made upon an order of the Probate Court, (sec. 148;) that no action shall be maintained upon any claim against an estate unless the claim has been presented to the executor or administrator and been rejected by him, or if approved by him, has been rejected by the Probate Judge of the county, (secs. 134, 136;) that a claim allowed by the executor or administrator and Probate Judge shall be ranked among the acknowledged debts of the estate, to be paid in due course of administration, (sec. 133;) and that the effect of a judgment rendered against an executor or administrator upon a claim

for money against the estate of the testator or intestate, [30] shall be only to \*establish the claim in the same manner as if it had been allowed by the executor or administrator and Probate Judge, (sec. 140.) These provisions, it is contended, divest the District Court of jurisdiction to entertain the action for the foreclosure of the mortgage, and place the debt to the plaintiff allowed by the executors and Probate Judge among the simple money demands against the estate of the testator, to be paid in the due course of administration, and the sale of the property mortgaged subject to the exclusive jurisdiction of the Probate Court. The only advantage which the plaintiff possesses by his mortgage, according to the position of the appellants, over the holder of an unsecured money demand against the estate is this: that in case the funds in the hands of the executors are insufficient to pay all the debts of the testator, he can insist upon an appropriation of the proceeds arising from the sale of the mortgaged premises to the payment of his demand in preference to the claims of other creditors.

In the case of *Ellissen v. Halleck* there was no presentation of the claim arising upon the personal obligation of the mortgagor to the executors for allowance, and the Court held, that such presentation and the rejection of the claim by them or by the Probate Judge were essential to the maintenance of the action for the foreclosure of the mortgage. In *Falkner v.*

*Folsom's Executors*, the claim was presented to the executors and allowed by them, and the Court held the allowance gave to the claim "all the virtues and properties which a judgment against executors can have under our system;" and that there was in consequence no necessity for the action. In *Ellissen v. Halleck*, there was a prayer in the complain, that the executors be adjudged to pay to any deficiency, which might remain after the application of the proceeds of the sale, out of other assets of the estate of the deceased. In *Falkner v. Folsom's Executors* there was a prayer that such deficiency be classed among the demands against the estate, and the executors be directed to pay the same in the due course of administration. In neither case did the Court distinguish between the claims arising upon the personal obligations of the mortgagors, and the right of the mortgagees to seek the aid of a Court of Equity to enforce their specific liens. Yet the distinction is obvious, and has been, tacitly at least, recognized in later \*cases. The decisions, therefore, [31] of those cases never met the full approbation of the profession, and as titles to property amounting in value to millions rest upon sales under decrees of the District Court in cases instituted for the foreclosure of mortgages made by deceased persons, we are justified in reconsidering the question of the jurisdiction of that Court in such cases.

The provision of the statute declaring that no sale of any property of an estate shall be valid unless made upon an order of the Probate Court, applies only to sales by executors and administrators. It has no reference to judicial sales under the decrees of the District Courts, nor to sales in pursuance of testamentary authority. (*Cowell v. Buckelew*, 14 Cal. 641; *Norris v. Harris*, 15 Id. 256; *Payne v. Payne*, 18 Id. 292.) The question then for consideration is, whether a mortgage lien is a "claim against the estate" of a deceased person, within the meaning of the Probate Act, so as to preclude an action for its enforcement until the debt secured by it has been presented to the executors and been *rejected* by them, or by the Probate Judge.

As we have seen, the statute declares, that a claim allowed shall be ranked among the acknowledged *debts* of the estate, to be *paid* in the due course of administration. (Sec. 133.)

Other provisions treat a claim as synonymous with a debt, or a legal demand for money. Notice is to be given "to *creditors* of the deceased requiring all persons having claims against the deceased to exhibit them." (Sec. 128.) "Every claim presented to the administrator shall be supported by the affidavit of the claimant, that the *amount* is justly *due*, that no *payments* have been made thereon, and that there are no *offsets* to the same to the knowledge of the claimant." (Sec. 131.) When any claim is only allowed in part by the administrator, executor, or Probate Judge, "he shall state in his indorsement the *amount* he is willing to allow." (Sec. 139.) "If the executor or administrator is himself a *creditor* of the testator or intestate" his claim shall be presented, duly authenticated, for allowance or rejection to the Probate Judge. (Sec. 145.) In the statements to be returned by the executor or administrator, "he shall designate the names of the *creditors*, the nature of each claim, when it became *due*, or will [32] become *due*, and whether it was allowed \*or rejected by him." (Sec. 147.) "If claims against the estate have been allowed, and a sale of property shall be necessary for their *payment*, or of the expenses of the administration," the executor or administrator may apply for an order to sell so much of the personal property as may be necessary. (Sec. 150.) If an executor or administrator "shall have *paid* any claim for less than its nominal value," he shall only be entitled to charge in his account so much as he shall have actually paid. (Sec. 220.) Other provisions equally pertinent might be cited. Whatever signification then may be attached to the term "claims," standing by itself, it is evident that in the Probate Act it only has reference to such debts or demands against the decedent as might have been enforced against him in his lifetime by personal actions for the recovery of money, and upon which only a money judgment could have been rendered. In this sense a mortgage lien is not a claim against the estate. In its enforcement a money judgment is not sought, but a subjection of the property to sale and the application of the proceeds to the payment of the debt secured. The debt secured may or may not be a personal liability. Whether it be so or not, it is distinct from the mortgage lien. In the present case the debt is evidenced by the promissory

note of the mortgagor, and the complaint alleges, as we have stated, its presentation and allowance as a claim against the estate. Such presentation and allowance were necessary to secure the payment of the debt out of the general estate, if that were desired, and perhaps also to prevent the debt from being barred by the statute, and thus to uphold the mortgage. But no judgment is asked against the estate either for the debt, or any part of it. The sole object sought is to reach the property mortgaged, and subject it to sale, and have the proceeds applied to the payment of the debt. The action is in the nature of a *proceeding in rem*. "A bill of foreclosure," says Mr. Chancellor Kent, "is for a specific performance of the mortgage contract, by passing the whole title of the mortgagor to the plaintiff, or the purchaser under the decree, and it is precisely a *suit in rem*. The whole object of the suit is the remedy by foreclosure or sale of the mortgaged premises, and it is therefore within the reason of the cases which speak of a suit concerning the title and possession of the \*land itself." (*Ketshaw v. Thompson*, 4 [33] Johns. 616; see also *Nagle v. Macy*, 9 Cal. 429.)

If the position of the appellants—that a mortgage lien is a claim within the meaning of the Probate Act, and cannot therefore be enforced by action when the demand secured by it is allowed by the executor or administrator and Probate Judge—were tenable, great inconvenience and, in numerous instances, manifest injustice would follow. If it be tenable at all, it must hold good, as counsel observes, in all cases, for the statute makes no exceptions. If true, it applies not merely to a case where the mortgagor is deceased, but where the equity of redemption was owned by the decedent, and to the case of a dry, naked mortgage with no personal liability. Thus, to adopt the illustrations given by counsel, if a mortgagor convey the equity of redemption and then die, no action can be maintained to foreclose the mortgage, because the representatives of the deceased mortgagor can only be proceeded against in the Probate Court. Or, if the lands of the decedent are incumbered by a mortgage of his grantor, no action will lie for the foreclosure of the mortgage, because the right to subject the real property of the deceased to sale is a claim against the estate. Numerous other instances

might be given showing equal inconvenience following the position asserted. It is clear to our minds that the Legislature never intended to give to the statute such an extended operation; but that in the use of the term "claims" it intended to embrace only such demands or liabilities as might by action be reduced to simple money judgments, and to leave the enforcement of specific liens and equitable rights to the ordinary proceedings in the District Courts. In the case of mortgages it must often happen—where there are subsequent incumbrancers, or the property has gone through numerous transfers—that complete justice can only be done to the different parties asserting interests, or a good title given upon the sale, through an equitable action.

Judgment affirmed.

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[34] \*E. A. WHITE v. MOSES *et al.* (No. 1.)

<sup>1</sup> **ALCALDE GRANTS.**—An Alcalde of San Francisco had, in 1849, authority as such to make grants of the lands of that pueblo, and the same presumptions in regard to the regularity and effect of his proceedings attach to him as to other officers.

**IDEM—RECITALS IN.**—Where the grant of an Alcalde recited that he made it by virtue of the authority in him vested, and in pursuance of the order of the Town Council: *Held*, that his general authority to make the grant as Alcalde was not limited by the recital, and that the grant was admissible in support of the title of the grantees without proof of any order of the Town Council.

<sup>2</sup> **IDEM—HOW MADE.**—A grant by an Alcalde in 1849 of pueblo lands in San Francisco, was not invalidated by the fact that it was made in pursuance of a sale at public auction by order of the Town Council.

**EJECTMENT—IMPROVEMENTS SET-OFF AGAINST DAMAGES.**—Where, in an action of ejectment, the proof shows that the entry of the defendants was upon a lot within the limits of an incorporated city, no presumption arises therefrom that they entered *bona fide* under any supposed rights amounting to color of title adverse to the owner, and under such proof they are not entitled to have the value of improvements made by them upon the premises deducted from the damages sustained by the plaintiff.

APPEAL from the Twelfth Judicial District.

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<sup>1</sup> As to the validity of Alcalde's grant, cited as authority in *Hutton v. Reed*, 25 Cal. 491; *Redding v. White*, 27 Cal. 285.

<sup>2</sup> As to tenure of the city in its pueblo lands, cited as authority in *San Francisco v. Canovan*, and *Hotelling v. Canovan*, 42 Cal. 556; *Scott v. Dyer*, 54 Cal. 433. See 61 N. Y. 397; 9 Wall. 602.

Ejectment by E. A. White, plaintiff, to recover from W. Moses, B. Wheaton, D. Winter, and J. B. Banks, defendants, nine undivided sixteenths of a lot in San Francisco.

The complaint sets up title and seizin in the plaintiff on the first of January, 1854, and avers an ouster by the defendants at that time, with a subsequent retention of the possession by them, and claims damages for use and occupation in the sum of five hundred dollars. The defendants answer jointly, denying generally the allegations of the complaints, and averring that they are lessees of one holding title from Limantour, to whom it is alleged that the Mexican Government originally granted the premises.

On the trial, the plaintiff introduced in evidence a deed from one Geary, formerly Alcalde of San Francisco, to J. T. White and J. de la Montagnie, and deduced title from these grantees to nine-sixteenths of the premises. The following is a copy of the Alcalde's deed:

"To all persons to whom these presents shall come or concern. \*The town of San Francisco, in the Territory of California, by John W. Geary, First Alcalde of San Francisco, greeting. [35]

'Whereas, the Ayuntamiento, or Town Council, of San Francisco, by virtue of the authority in them vested by resolution passed on the first day of December, in the year of our Lord one thousand eight hundred and forty-nine, ordered and directed that certain town lots should be exposed to public sale and sold to the highest bidder; and whereas, after due public notice of said sale, the same were exposed to public sale at auction in said town, on the tenth day of December, in said year, and one of said lots, numbered on the map of said town ten hundred and twenty, was sold to Joseph T. White and John de la Montagnie, for the sum of five hundred and ten dollars, being the highest price then and there offered for the same.

"Therefore, by virtue of the authority in me vested, and in pursuance of the order of the Ayuntamiento, or Town Council, of the town of San Francisco, I, John W. Geary, First Alcalde as aforesaid, for and in consideration of five hundred and ten dollars to me in hand paid, in trust for said town, before the delivery of these presents, (and the receipt

of which is hereby acknowledged,) have granted, bargained, sold, assigned, conveyed, and confirmed, and by these presents do grant, bargain, sell, assign, convey, and confirm, unto the said J. T. White and J. de la Montagnie, their heirs and assigns forever, the said fifty vara lot, numbered ten hundred and twenty, situated in said town on the south-west corner of Taylor and Sutter Streets, together with all and singular the advantages and profits whatsoever in and to the same, belonging or in any manner appertaining; and also the estate, right, title, interest, property, claims, and demand whatsoever of the said town of San Francisco, in and to any and every part thereof. To have and to hold all and singular the above described lot of ground as fully as the same was held and possessed by the said town of San Francisco, as aforesaid, unto the said White and Montagnie, their heirs and assigns, to the only proper use and behoof of the said White and Montagnie, their heirs and assigns for ever.

"In testimony whereof, I, the said John W. Geary, First Alcalde as aforesaid, have hereunto set my hand and [36] official seal, this tenth \*day of December, in the year of our Lord one thousand eight hundred and forty-nine.

[L.S.]

"JOHN W. GEARY,

"First Alcalde of San Francisco.

"Signed, sealed, and delivered in the presence of

"J. HERON FOSTER,

"H. L. DODGE."

A certificate of proof by one of the subscribing witnesses of the execution of the instrument was attached thereto.

No preliminary proof having been offered by plaintiff, defendants objected to the introduction of this deed on the ground that there was no evidence of the legal existence of the town of San Francisco, or its Town Council therein mentioned, and also because the special authority of said Alcalde therein recited was not first proved. The objection was overruled, and defendants excepted.

In relation to the possession of defendant Banks, Thibault, a witness for plaintiff, testified—"I saw a sign on the lot; to let, or sell, inquire of a man on Kearny Street by the name of Banks. I called there, but do not recollect what was said.



The substance of it was about his being in possession of the lot." On cross-examination he said: "The name of the man I called to see on Kearny Street might have been Munson, and not Banks. I did not know him. He kept a wood-yard on Kearny Street, nearly opposite St. Mark's Place."

Peter Secalovich, a witness for defendants, after saying that he had known the lot several years, testified: "I know James H. Munson; kept at 14 Kearny Street, nearly opposite St. Mark's Place, when this suit was commenced. The notice upon the lot was, 'To let, inquire of Munson, at 14 Kearny Street;' he kept a wood-yard and setting saws. Banks had nothing to do with it (the lot;) if he had, I should have known it."

As to the possession of defendant D. Winter, Thibault testified: "I think there was a bill upon the lot, 'For lease or sale, by Winter.' \* \* \* I called upon Mr. Winter at his shop on Jackson Street (off the lot;) I had a conversation with him; I cannot state what it was, or anything that was said. The conversation was to the same effect as the other; it was as to whether he claimed possession of the lot. [37] He claimed that he owned the lot, and was in possession." On cross-examination witness said: "I cannot remember what Winter said in the conversation with him on Jackson Street. I cannot state anything that he said."

William Winter was sworn as a witness for the defendants, and testified: "I am the brother and partner in business of the defendant Daniel Winter; was in business with him at the time this action was commenced. He was not then in possession of this lot or claiming it. I have heard the testimony given by the witness Thibault on this trial to-day. I recollect the conversation spoken of by him as with Mr. Winter; I am the Mr. Winter with whom he had the conversation on Jackson Street, not the defendant Winter, my brother."

No other testimony was given as to the possession of these defendants. No proof was offered by defendants as to the Limantour title.

At the close of the trial, defendants asked the Court to instruct the jury, that if they should find for plaintiff, the value of the improvements placed upon the premises by defendants

should be deducted from the amount of damages which plaintiff might have sustained by their occupation, which instruction the Court refused, and defendants excepted.

The jury found for the plaintiff against all the defendants, and assessed the damages at one hundred and six dollars and fifty cents, and judgment was entered accordingly. Defendants moved for a new trial, which was denied, and from this order and the judgment, they appeal.

*J. P. Treadwell*, for Appellants.

I. Assuming that the town owned the land in fee to its own use, affected by no trust, and that the Town Council had the power to sell it, or order it to be sold and conveyed at public auction to the highest bidder for cash, still the deed from the agent or officer, purporting to be made in execution of a power from the Town Council, is no proof that such special power had been conferred. Such special power must be specially proved by the party asserting and relying upon the act done under it. This is too clear for either [38] \*argument or authorities. Nor can the argument prevail that Geary as Alcalde had the power to make this deed, independent of the special power under which it is recited to be made.

No Alcalde of San Francisco, Mexican or American, ever did at any time assume, by virtue of his office, to sell any land at public auction to the highest bidder for cash or otherwise. Even the granting of lots by Alcaldes to settlers had been discontinued long before the date of this deed by Geary.

The ordinance passed two years before by the Town Council, that the Alcalde make no more grants of lots, except as directed by the Council, had been fully acquiesced in; and no Alcalde grant made subsequent, unsustained by the special authorization of the Town Council, has ever been sustained in this Court, or any Court in San Francisco.

Alcalde Geary never, in any case, assumed to make a grant of land by virtue of his office, or without a special power from the Council. He did not assume to make the deed in this case by virtue of his office, but under the power recited in it. This is sufficient for us, all else aside. Geary assumed to act on private authority of the Town, not public law.

That the recital of a power of attorney in a deed by the attorney is evidence of his power, is preposterous.

II. Neither the Town Council nor the Alcalde had the power to sell the public lands at public auction to the highest bidder for cash. The town held the public lands in trust merely, and not to its own use. The land could not be taken on execution against the town, nor could it be sold for the purpose of paying its debts. No more, then, could it be sold at public auction to the highest bidder for the purpose of raising money.

This is the language and decision of this Court in *Hart v. Burnett*, 15 Cal. 580, 583.

That the present defendants can raise and take advantage of the objection, is within the direct decision of this Court in the same case. (Id. 615.)

III. The Court erred in instructing the jury, that if they found for the plaintiff the latter was entitled to recover as damages the value of the use and occupation, without any deduction or \*allowance for the permanent improve- [39] ments. The Court should not have taken from the jury all discretion, to find as damages the value of the use and occupation diminished by the value of the improvements made in good faith. In the absence of any statute the jury have the discretion, and the general provision of the Practice Act (sec. 257) is in affirmance of it.

IV. There was no evidence that either the defendant Banks, or the defendant Daniel Winter, was ever in possession of this lot, yet damages for use and occupation are recovered against them.

*Wm. W. Crane, Jr.*, for Respondent.

I. The grant is *prima facie* evidence, both of the power of the Alcalde to make the grant, and also that he performed all the prerequisite acts necessary to make the exercise of the power valid.

If I understand the decisions of this Court aright, commencing with *Cohas v. Raisin*, down to *Payne v. Treadwell*, they are conclusive upon the point that "the same presumption in regard to the regularity and effect of these proceedings attach to him (the Alcalde) as to other officers." This point has been so often and thoroughly discussed by this Court that

I need only refer to *Hart v. Burnett*, 15 Cal. 616; *Payne v. Treadwell*, 16 Cal. 227, 229, 239.

Again: the defendants having no relation to the premises except as intruders, the recitals of the grant are conclusive against them. (*Stark v. Barrett*, 15 Cal. 366; *Wallace v. Maxwell*, 1 J. J. Marsh, 447, 450; *Devall v. Choffin*, 15 La. 566; *Davis v. Police Jury*, 1 Annual R. 295; *Hickman v. Boffman*, Hardin, Ky., 362; *Phillips' Lessee v. Robertson*, 2 Tenn. 421.)

Assuming that the Alcalde acted under two powers, one his general granting power as the executive officer of the pueblo, the other specially given by the ordinance, yet there being no proof of the special power, the recitals of such power will be disregarded and the presumption indulged that he acted under the general power. (*Selby v. Bass*, 19 La. 499.)

II. It is claimed by appellants that neither the Town Council or Alcalde could sell the land of the pueblo at [40] public auction, and \*especially could not sell it to pay the debts of the corporation, and *Hart v. Burnett* is relied upon in support of the two propositions. The answer is—1st, that *Hart v. Burnett* in nowise decides that the public lands of the pueblo could not be disposed of at public auction, but only that these lands were held in trust and not “subject to seizure and sale under execution;” 2d, it nowhere appears in the record of this case that the premises in controversy were sold to pay the debts of the pueblo or city, or to raise revenue.

III. Defendants did not show that they entered into possession under color of title and in good faith, and therefore were not entitled to offset the value of their improvements against the damages for use and occupation.

IV. The evidence in regard to the possession of Winter and Banks was conflicting, and the verdict of the jury upon that point will not therefore be disturbed.

NORTON, J. delivered the opinion of the Court—COPE, J. concurring.

The first objection urged in this case is to the ruling of the Court below in allowing the Alcalde grant to be read in evidence, without proof of the order of the Town Council directing the sale which is recited in the grant.

The Alcalde states in the grant that he makes it by virtue

of the authority in him vested, and in pursuance of the order of the Town Council. If the Alcalde had authority to make grants of the pueblo lands, the former of these powers was sufficient to sustain this grant, although the latter may not have existed. The law upon this point, whatever may be the opinions of individuals, or the determinations of tribunals not governed by our judgments, must be considered settled so far as it depends upon the decision of this Court. In the case of *Cohas v. Raisin*, 3 Cal. 443, the Court announced these among other propositions: "2d. That the Alcaldes were the heads of the Ayuntamientos, or Town Councils, and rightfully exercised the power of granting lots." "4th. That a grant of a lot by an Alcalde, whether a Mexican or any other nation, raises the presumption that the Alcalde was a properly qualified officer, that he had authority to make the grant, and that the land \*was within the boundaries of the [41] pueblo." These propositions have not since been overruled, but have more than once been affirmed. In the case of *Dewey v. Lambier*, 7 Cal. 347, which was an action to recover a lot granted by Leavenworth, Alcalde, the Court, speaking of the case of *Cohas v. Raisin*, say: "We take this occasion to approbate the same, and to announce our determination of adhering to it." In the case of *Welch v. Sullivan*, 8 Cal. 165, the Court say: "It is a misnomer to call these titles *Americae* Alcalde grants. They were the grants of the pueblo of its own property, which it had the right to transfer by virtue of the municipal law which was continued in force by the new sovereign until 1850. As to all grants made by the Alcaldes, it must be presumed that they were municipal lands which these officers had a right to grant, until the contrary is shown." In the case of *Payne and Dewey v. Treadwell*, 16 Cal. 232, 239,) which was an action to recover a lot held under a grant by an American Alcalde and decided as late as 1860, the Court say: "Now, that the Alcalde is the proper officer to make the grant is unquestionable. The same presumptions in regard to the regularity and effect of his proceedings attach to him as to other officers." "Our conclusion is, that upon two distinct and independent grounds, the validity of these Alcalde grants may be safely rested: 1st, upon the title of the pueblo and the presumed authority of

the Alcaldes, as the proper granting officers to grant lots within the pueblo." In the case before us nothing appears in the record restricting the ordinary powers of the Alcalde as the proper granting officer to grant lots within the pueblo, and under the law as settled by the authorities above cited the Alcalde grant was properly admitted in evidence without proof of the order of the Town Council.

It is secondly objected that the plaintiffs are bound by the recitals in the grant under which they claim, and by which it appears that the grant was made upon a sale at auction; that it has been settled by the case of *Hart v. Burnett*, 15 Cal. 530, that the pueblo lands cannot be sold on execution against the town to satisfy its debts, and that it follows as a necessary result of that decision, and that the language of the Court [42] authorizes the conclusion, that the town \*could not sell the lands at auction to procure funds for the use of the town, and that hence the grant in question is void.

The case of *Hart v. Burnett* decided that the pueblo held its land in trust for the use and benefit of the people thereof, and not in absolute ownership for its own use, like an individual or private corporation, and that such lands could not be sold on execution against the will of the town to satisfy its debts. And although the Court say that the town could not sell out its lands to an individual *in gross*, it nowhere says that the town could not voluntarily convey a lot to a citizen for a consideration, or voluntarily sell the lots to raise funds for the use of the town in any appropriate way not inconsistent with the growth and prosperity of the town. But in various parts of the opinion the Court speaks of these lands as being held in trust to be granted to settlers or others in limited quantities, or disposed of for the support of the municipality. (See pages 580, 582, 594.) The fact, therefore, that the lot in question was sold at auction by direction of the Town Council, does not render the grant of the Alcalde void.

The defendants were not entitled to have the value of the improvements put upon the premises by them deducted from the damages, because it does not appear that they held "under color of title adversely to the claims of the plaintiff in good faith." No such averment is made in the answer, or proof made at the trial. The answer, in addition to a general de-

nial, sets up title under Limantour (of which no proof was given) and a five years' adverse holding. The proof shows that the entry of the defendants was upon a lot within the limits of an incorporated city, and no presumption can arise that they entered *bona fide* under any supposed right amounting to a color of title adverse to the owner.

It is fourthly objected that there was no evidence to warrant the jury in finding that the defendants Banks and Winter were in possession of the premises at the time this action was brought, and we think this objection well taken. The notice seen by the witness Thibault on the lot was by itself no evidence against any person not proved to have authorized it to be placed there, and the declarations made to Thibault by persons not at the time on or in the vicinity of the premises, and whom he supposed to be these defendants, but as \*to one of whom he says he did not know him, and [43] that his name might have been Munson instead of Banks; and as to the other, he does not say that he knew him, but simply speaks of him as Mr. Winter, do not amount to proof that either of these two defendants were in possession. If there had been no question at the trial as to the identity of these persons, the reference to one of them as Mr. Winter might have implied a knowledge by the witness that he was the defendant in this action, but when this identity was disputed, and another person of the same name was a witness in the case, and testified that he was the person with whom Thibault had his conversation, there should have been some more direct evidence by Thibault that he knew the person, to entitle that person's declaration to the weight of evidence against the defendant Winter.

The judgment against Banks and Winter must, therefore, be reversed; but the counsel on both sides in the briefs filed in this case having conceded that a judgment might in this case be entered for and against such of the parties as the facts appearing in the record should warrant, we shall order the judgment to be affirmed as to the defendants Moses and Wheaton, and reversed as to the defendants Banks and Winter, and that the Court below render judgment in favor of Banks and Winter for their costs in the Court below, and that they also have execution for their costs on this appeal.

J. P. WHITE *et al.*, EXECUTORS, v. MOSES *et al.* (No. 2.)

**EXECUTOR'S DEED AS EVIDENCE OF SALE.**—An executor's deed is not admissible in evidence of a sale of a testator's property, except upon preliminary proof of a compliance with the statutory provisions for sales by executors and administrators, or of an express power in the will authorizing the sale in the mode in which it appears by the deed to have been made.

<sup>1</sup> **EJECTMENT—DEED OF EXECUTOR AS EVIDENCE OF TITLE.**—Thus, in an action of ejectment by the executors of W. to recover from M. certain real estate devised by the testator, the defendant, for the purpose of showing an outstanding title, offered in evidence a deed of the property made by the executors to a third person, which deed recited that the executors were authorized by the will "to sell his (the testator's) property as therein mentioned and contained." No order of the

[44] Probate Court for the sale of the \*property was shown, but the admissibility of the deed was rested upon its own recitals with proof of its execution: *Held*, that it was inadmissible; that from the recital alone, without the production of the will, it could not be concluded that the power to sell was given absolutely by the will; and that in the absence of proof of such a power in the will, the validity of the sale could only be established by proof of a compliance with the forms prescribed by statute for the sale of property by executors.

**APPEAL from the Twelfth Judicial District.**

The facts, except as they are stated in the opinion of the Court, are the same as in the preceding case of *E. A. White et al. v. Moses et al.*

*J. P. Treadwell*, for Appellants.

*Wm. W. Crane, Jr.*, for Respondents.

NORTON, J. delivered the opinion of the Court—COPE, J. concurring.

This case differs in only one particular from that of *E. A. White* against the same defendants, which is decided at the same time with this.

On the trial of this action, the defendants offered to read in evidence a certified copy of a record of a deed of the premises in question, executed by these plaintiffs as executors to *E. A. White*, for the purpose, apparently, of showing an outstanding title in a third person, or title out of the plaintiffs. This evidence was ruled out upon the objection: first, that the loss of the original was not proved, and second, that the deed conveyed no title—the defendant not having shown

<sup>1</sup> See note 2 under *Fallon v. Butler*, ante 24.



the necessary preliminary steps to a sale and conveyance of the premises by the plaintiffs as executors. Without considering the sufficiency of the first objection, we think this ruling was correct under the second. By section one hundred and forty-eight of the "Act to regulate the Settlement of the Estates of Deceased Persons" it is provided, that "no sale of any property of an estate shall be valid unless made under order of the Probate Court. In the case of *Payne v. Payne*, 18 Cal. 291, it was decided that a Surrogate's order was not necessary where a power to sell was given by the will. The deed in the case before us recites, that the executors were authorized by the will "to sell his (the [45] testator's) property in California as therein mentioned and contained." It does not appear by this that they had an absolute power to sell. It may have been "mentioned and contained" in the will that the sale was to be under the circumstances and in the manner provided by law for sales by executors. In order to show that a sale by the executors without a Surrogate's order would have been valid to convey the title, it should have appeared by the production of the will that the power to sell was given absolutely. It is possible that the expression, "as therein mentioned and contained," is used as a designation of the lands authorized to be sold, and not as a designation of the mode and circumstances under which a sale might be made. But in the absence of any other guide to the meaning than the recital in the deed, we are not authorized to give it such a construction.

It is, therefore, ordered that the judgment be affirmed as to the defendants Moses and Wheaton, and reversed as to the defendants Banks and Winter, and that the Court below render a judgment in favor of Banks and Winter for their costs in the Court below, and that they also have execution for their costs on this appeal.

## SHAVER v. OCEAN MINING COMPANY.

<sup>1</sup> NOTE SIGNED BY AGENT, LIABILITY ON.—An agent signing his own name to a promissory note made on behalf of his principal is not personally liable as a maker if the instrument itself discloses the intention to bind his principal and not himself.

IDEM—PRESUMPTIONS.—James Harter and S. N. Stranahan were sued as joint makers with the Ocean Mining Company of a note, set forth in the complaint, in the following form: "Three months after date, the Ocean Mining Company promise to pay to W. G. Bright or order one thousand dollars, for value received, with interest at the rate of two per cent. per month. (Signed) James Harter, Trustee, S. N. Stranahan." Judgment by default was rendered against the company and H. and S.: *Held*, that this judgment was erroneous; that the instrument itself showed the intention of H. and S. to bind the company and not themselves, and that they were not personally liable. *Held, further*, that the presumption as to the character in which H. and S. signed the note, created by the form of the instrument, was not destroyed by an allegation in the complaint that they executed as makers.

[46] \*APPEAL from the Fifth Judicial District.

The facts are stated in the opinion.

C. Dorsey, for Appellant, cited *Haskell v. Cornish*, 13 Cal. 45.

L. Quint, for Respondent, contended: 1st, that inasmuch as the complaint alleged that Harter and Stranahan executed the note, the fact stands confessed by their default; and 2d, that the note showed on its face that it was not the note of the company, because a trustee has no authority to execute a note for a corporation—that it was, therefore, the note of S. and H.—that the affix of "trustee" is not sufficient to show that Harter did not contract as principal, and there is nothing to indicate that Stranahan acted in a representative character.

COPE, J. delivered the opinion of the Court—FIELD, C. J. and NORTON, J. concurring.

This is an action on a promissory note in the following form: "Three months after date the Ocean Mining Company promise to pay W. G. Bright or order one thousand dollars, for value received, with interest at the rate of two per cent.

<sup>1</sup> Liability of agent cited as authority in *Hall v. Crandall*, 29 Cal. 571, the doctrine in the latter case being affirmed in *Blanchard v. Knull*, April T. 1871, (not reported); and see *Lander v. Castro*, April T. 1872, (not reported.) See also cases cited in *Hall v. Crandall*, 29 Cal. 571; and see *Zeigler v. Wells*, 28 Cal. 285; *Love v. S. N. L. W. & M. Co.*, 32 Cal. 654; *Blood v. Marcuse*, 38 Cal. 590.

per month." The note is signed, "James Harter, Trustee, S. N. Stranahan," both of whom are made defendants, and charged as makers jointly with the company, which is a corporation. No answer being filed, judgment was entered against all of the defendants; and from this judgment Harter and Stranahan appeal.

The complaint alleges that the note was executed by Harter and Stranahan, as well as by the company; but the note itself, a copy of which is set out in the complaint, shows that it was not their intention to bind themselves personally. The promise stated in the note is that of the company, and by failing to answer, the note is admitted as a company obligation, and this being the character of the instrument, as appearing upon its face, we regard it as binding upon the company alone. It is evident that Harter and Stranahan signed it merely as agents, and as a judgment has been recovered upon it against the company, their authority to execute it cannot be questioned; its language shows [47] that they executed it for the company and not for themselves. The law governing the case is distinctly laid down in *Haskell v. Cornish*, 13 Cal. 45.

The judgment is reversed as to Harter and Stranahan, and the cause remanded.

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## COLES v. SOULSBY.

**ACCORD AND SATISFACTION.**—Accord and satisfaction, as a defense to an action for the recovery of money, must be specially pleaded.

<sup>1</sup> **ISSUES RAISED BY DENIAL.**—A denial, whether general or special, only puts in issue the allegations of the complaint. The difference between a general and special denial in this respect is only in the extent to which the allegations are traversed.

<sup>2</sup> **NEW MATTER.**—New matter must be specially pleaded; and whatever admits that a cause of action, as stated in the complaint, once existed, but at the same time avoids it—that is, shows that it has ceased to exist—is new matter. *Piercy v.*

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<sup>1</sup> Effect of denials in answer, *Moss v. Shear*, 30 Cal. 472.

<sup>2</sup> That new matter must be specially pleaded, cited as authority in *Moss v. Shear*, 30 Cal. 472. See 2 Mont. 566; 23 Wis. 523.

*Sabin*, 10 Cal. 22, and *Glazer v. Clift*, Id. 303, as to the necessity of pleading new matter in defense, affirmed, and held to have overruled the doctrine of *Gavin v. Annan*, 2 Cal. 494, and *McLaren v. Spalding*, Id. 510.

<sup>3</sup> SEPARATE PROPERTY—SALE BY MARRIED WOMAN.—The provision of the "Act defining the Rights of Husband and Wife," that a married woman cannot make any sale or other alienation of her separate property, except by an instrument in writing, has reference to property other than money. It does not contemplate that every time a married woman pays her money for articles purchased she must execute an instrument in writing in order to make a valid transfer of the money.

<sup>4</sup> PAROL EVIDENCE OF, CONSIDERATION IN DEED.—The consideration clause of a deed is not conclusive. It estops the grantor from alleging that he executed the deed without consideration. It cannot be contradicted so as to defeat the operation of the conveyance according to the purposes therein designated, unless it be upon the ground of fraud; but, with this exception, it is open to explanation, and may be varied by parol proof.

### APPEAL from the Fifth-Judicial District.

The facts are stated in the opinion.

*H. P. Barber*, for Appellant.

I. The evidence of defendant went to prove an accord and satisfaction. No such defense is set up by the answer.

The proposed defense consisted of new matter, admitting that plaintiff once had a good cause of action, but that [48] it had been dis-\*charged by matter subsequent. (*Piercy v. Sabin*, 10 Cal. 22; *Glazer v. Clift*, Id. 303.)

II. The evidence was improper as tending to show an alienation or surrender by a *femme covert* of \$8,000 of her separate property by parol. The statute declares that "no sale or other alienation of any part of such property can be made nor any lien or incumbrance created thereon, unless by an instrument in writing, signed by the husband and wife, and acknowledged by her upon an examination separate and apart from her husband." (Act defining the Rights of Husband and Wife of April, 17th, 1850, sec. 6.) Her verbal admissions could no more show a transfer of this property than if having a valid title in fee simple by deed to real estate she had verbally declared it was not hers. The surrender of this

<sup>3</sup> Commented on and approved in *Peck v. Vandenberg*, 30 Cal. 56.

<sup>4</sup> Parol evidence to vary written instrument, cited as authority in *Hendrick v. Crowley*, 31 Cal. 476; and in *Rhine v. Ellen*, 36 Cal. 369. Commented on in *Peck v. Vandenberg*, 30 Cal. 28; and see *Cunningham v. Hawkins*, 27 Cal. 603; *Donahue v. McNulty*, 24 Cal., 411; *Sears v. Dixon*, 33 Cal. 332; *Gay v. Hamilton*, Id. 690; *Jackson v. Lodge*, 36 Cal. 63; *Raynor v. Lyons*, 37 Cal. 454; *Ingersoll v. Truebody*, 40 Cal. 611; and see *Pierson v. McCahill*, post 122, and note.

property could only be made in the mode provided by statute. A verbal transfer, or admission of transfer, amounted to nothing. When plaintiff had proved she was entitled to this money from defendant, she, being a *femme covert* and this her separate property, the only mode of destroying that right was the one provided by the act. (*Selover v. American River Co.*, 7 Cal. 266; *Luning v. Brady*, 10 Id. 265.)

The law is a judicious one; for while abrogating the common law rule that the entire property belonged to the husband after marriage, it prevents (by requiring the signature of both to the deed) the wife from injudiciously transferring the title to her separate personal property without the knowledge of her husband, and at the same time prevents the husband, having it in possession, from legally disposing of it without the knowledge or consent of the wife.

III. The evidence was improper, as tending to vary and contradict the recitals of the deed. It was introduced to show that instead of "natural love and affection and the consideration of one dollar" the real consideration was the giving up by a *femme covert* of the amount of \$8,000, besides interest. Her parol admissions that she considered the deed a settlement were in fact nothing more than her conclusions of law upon its effect. (9 Cushing, 592, where a similar case arose and the evidence was rejected.)

Take the converse of the proposition, could the plaintiff have shown by parol that the consideration specified by defendant in the deed did not mean an interest in a quartz lead, but \$50,000?

\**L. Quint*, for Respondent.

[49]

I. The answer is a general denial, and has the same influence and effect as the general issue at common law; and accord and satisfaction may be given in evidence under it. (*Gavin v. Annan*, 2 Cal. 492; *McLaren v. Spaulding*, Id. 510; Gould's Plead. 336, ch. VI., sec. 59; Steph. Plead. 83, 104.)

II. The statute prohibiting the wife from alienating her separate property, except by instrument in writing, was not intended to apply to a payment by her of money or to a release of a simple money demand.

III. It is always permissible to show the actual consideration of a deed. (*Bennett v. Solomon*, 6 Cal. 134; *Story v. Green*, 12 Id. 162; *Bullard v. Briggs*, 7 Pick. 533; *Johns v. Church*, 12 Johns. 557.)

FIELD, C. J. delivered the opinion of the Court—COPE, J. and NORTON, J. concurring.

This is an action to recover of the defendant the sum of \$7,890, being the amount of certain proceeds received by him from an interest in a quartz vein belonging to the plaintiff. The interest constituted the separate property of the plaintiff, who is a married woman, and the proceeds were received by the defendant previous to her marriage. The complaint is special and verified, and it is admitted that on the trial the plaintiff proved her case as it is there stated. The answer, with the exception of an averment as to an offset of three hundred dollars, amounts only to a denial of the allegations of the complaint. The defense upon which the defendant relied on the trial was an accord and satisfaction. To establish this, he first introduced in evidence three deeds, executed subsequently to the marriage of the plaintiff. The first deed was a quitclaim from the defendant to the plaintiff of the interest in the quartz vein, from which the proceeds claimed in the action were received, and of a lot of ground in the city of Sonora. It was dated on the thirteenth of January, 1860. The second deed bore the same date, and was from the plaintiff and her husband to the defendant, conveying the same property to him in trust during his [50] life, to pay over \*the rents, issues, and profits to her; upon his death the property to revert to her; but if she died before him, leaving no heirs, then the property to vest in him. The third deed was dated August 23d, 1860, and was from the defendant to the plaintiff and her husband, stating that in consideration of natural love and affection, and for the sum of one dollar, he conveyed to them all his interest in the property, and surrendered all trusts and powers set forth in the second deed above mentioned. The defendant then introduced, against the objection of the plaintiff, evidence showing that the third deed was given and received in full settlement of all matters of difference between the

parties, and proved admissions of the plaintiff to the same purport, made since its execution. Upon this evidence the verdict and judgment passed for the defendant; and the question presented by appeal is, whether the evidence was admissible. The objections urged to its admissibility rest substantially upon three grounds: 1st, that the defense of accord and satisfaction was not pleaded; 2d, that it tended to show an alienation and surrender of a demand of a married woman by parol; and 3d, that it tended to contradict and vary the recitals of the deed as to its consideration.

The first ground is well taken. The doctrine of the cases of *Gavin v. Annan*, 2 Cal. 494, and *McLaren v. Spalding*, Id. 510, were overruled by *Piercy v. Sabin*, 10 Id. 22, and *Glazer v. Clift*, Id. 303. In our practice, a denial, whether general or special, only puts in issue the allegations of the complaint. The difference between a general and special denial in this respect is only in the extent to which the allegations are traversed. New matter must be specially pleaded; and whatever admits that a cause of action, as stated in the complaint, once existed, but at the same time avoids it—that is, shows that it has ceased to exist—is new matter. It is that matter which the defendant must affirmatively establish. Such are release, and accord and satisfaction. Defenses of this character must be distinctly set up in the answer, or evidence to establish them will be inadmissible. This view disposes of the appeal and necessitates a reversal of the judgment; but as by an amendment to the answer the defense of an accord and satisfaction may be set up on a second trial, it becomes important to pass upon the other questions raised.

\*The statute, it is true, provides that a married [51] woman cannot make any sale or other alienation of her separate property, except by an instrument in writing. (Act defining the Rights of Husband and Wife, sec. 6.) But in this provision the statute has reference to property other than money. It does not contemplate that every time a married woman pays her money for articles purchased she must execute an instrument in writing in order to make a valid transfer of the money. In the present case, the money was in the hands of the defendant, and the plaintiff could as well consent by

parol to its retention by him as she could have paid it to him without writing if it had been at the time in her possession.

It is not a valid objection to the admissibility of the evidence, that it showed a consideration different from that expressed in the deed. The consideration clause of a deed is not conclusive. It estops the grantor from alleging that he executed the deed without consideration. It cannot be contradicted so as to defeat the operation of the conveyance according to the purposes therein designated, unless it be on the ground of fraud, but with this exception it is open to explanation and may be varied by parol proof. A limitation, it is true, is placed by some adjudicated cases upon the character of the proof admitted; that it must be restricted to establishing a consideration of the same species with that expressed. (*Garret v. Stewart*, 1 McCord, 514.) The limitation, however, does not appear to rest upon any sound principle. (See *Bennett v. Solomon*, 6 Cal. 135; *McCrea v. Purmort*, 16 Wend. 460; *Bullard v. Briggs*, 7 Pick. 537.)

Judgment reversed, and cause remanded.

## MICHAEL HAYES v. D. O. SHATTUCK.

**ATTORNEY-AT-LAW—AUTHORITY TO APPEAR.**—The authority of an attorney-at-law to appear for parties for whom he enters an appearance in an action will be presumed where nothing to the contrary appears.

**VOLUNTARY APPEARANCE WAIVES ISSUANCE OF SUMMONS.**—A voluntary appearance<sup>1</sup> by a defendant gives jurisdiction of his person without the issuance of any summons. This was equally the case under the Practice Act as it stood in 1855.

[52] **DECREE IN FORECLOSURE CONCLUSIVE.**—\*In an action of ejectment by a purchaser under a decree in a suit for foreclosure of a mortgage, to which the mortgagees were parties, against a subsequent lessee of the mortgagees, no question can be raised by the defendant as to the due execution of the mortgage. Of this fact the decree in the foreclosure suit is conclusive.

### APPEAL from the Fourth Judicial District.

On the eleventh day of November, 1854, Daniel McMillan and Mary B., his wife, executed a mortgage to Geo. O. Whitney upon a lot in San Francisco on which they were then residing. The mortgage was signed and acknowledged by

<sup>1</sup> *Shay v. Superior Ct.*, 57 Cal. 542.



both parties, but in the body of the instrument the wife alone was mentioned as the grantor. In April, 1855, an action to foreclose this mortgage was commenced by Whitney in the Fourth District Court. A complaint was filed, but no summons was ever issued. On the sixth day of April an answer was filed on behalf of McMillan and wife by one W. M. Stewart, an attorney-at-law, and professing to act as the attorney for defendants, which answer admitted all the facts stated in the complaint, and authorized a judgment as prayed for. A decree of foreclosure was entered, under which the property was sold, and plaintiff became the purchaser, and at the expiration of six months received the Sheriff's deed. Subsequently McMillan and wife leased the premises to the defendant, who entered into possession. This action is ejectment by the plaintiff to recover the premises; and in his complaint he sets forth the proceedings by which he acquired the title. Defendant in his answer sets up his lease, and denies plaintiff's title, claiming that the mortgage was void, and that the Court had no jurisdiction of the persons of the defendants in the foreclosure action. A trial was had, resulting in a verdict and judgment for plaintiff. Defendant moved for a new trial, which was denied, and from this order and the judgment he now appeals. All other material facts appear in the opinion.

*D. O. Shattuck, Appellant, in pro. per.*

I. In the case of *Whitney et als. v. McMillan & Wife* the Court had no jurisdiction of the persons of the defendants nor of the subject matter.

1. To give a Court jurisdiction an action must be commenced. \*(*Cohen ex parte*, 6 Cal. 329; *State Bank v. Caron*, 5 Eng. Ark. 479; *Randolph Co. v. Ralls*, 18 Ill. 29.) [53]

2. At the date of these proceedings (April 6th, 1855) an action could be commenced only by filing a complaint, "and the issuance of a summons therein." (Pr. Act, sec. 22.)

Here no summons was ever issued. The change of the section, as it now stands, was made afterwards, and could not affect this suit. The thirty-fifth section does not help it. That provides that the voluntary appearance of the defendant

shall be equivalent to the service of the summons; but does not dispense with its issue or make the complaint alone the commencement of an action. As there was no action commenced, of course the Court had no jurisdiction of the subject matter.

3. Until there was an action an attorney could not bind the parties, unless specially authorized. (Wood's Dig. p. 66, art. 140; *Herbert v. Alexander*, 2 Va. 503; *Jenkins v. Gillespie*, 10 S. & M. 34.)

The attorney, it will be seen, can bind his client in the various steps of an action, and "not otherwise." If there is no action, there is no attorney necessary nor presumption in his favor.

II. The judgment and decree of a Court without jurisdiction of the subject matter and of the persons is absolutely void. (*Parsons v. Davis*, 2 Cal. 421; *Whitwell v. Barbier*, 7 Id. 54; *Gray v. Hawes*, 8 Id. 562.)

III. The paper purporting to be a mortgage to Whitney was and is a nullity.

1. Mary B. McMillan was a married woman at that time.

2. The property was common property, and a homestead.

3. The deed, if anything, is the deed of the wife alone—the husband's name nowhere appearing as a grantor. It is her sole deed. (*Cincinnati v. Newell*, 7 Ohio, N. S., 37—cited 18 U. S. Dig. p. 395, sec. 197; *Agricultural Bank of Miss. v. Rice*, 4 How. U. S. 240.)

*Ingolsby v. Juan*, 12 Cal. 575, does not controvert the above. Whether as a homestead or as common property, the deed of the wife alone is a nullity. (*Poole v. Gerrard*, 6 Cal. 73—affirmed in *Morse v. McCarty*, 7 Id. 346; *Revalk v. Kraemer*, 8 Id. 74.)

[54] \**E. Cook*, for Respondent.

I. If the Court had jurisdiction of the parties in the foreclosure suit, the decree therein is conclusive as to the execution of the mortgage and the validity of the lien on the premises.

II. The only object of a summons is to bring the parties into Court, and its issuance is unnecessary where the parties voluntarily appear. (*Pollock v. Hart*, 2 Cal. 193.)

III. An appearance by an attorney in an action will be presumed to have been by authority of the parties for whom he appears. (*Suydam v. Pitcher*, 4 Cal. 280; *Cronise v. Craghill*, 4 Id. 120; *Mahoney v. Pearman*, 4 Duer, 603.)

IV. The mortgage having been signed by husband and wife was the deed of both, notwithstanding that the wife alone was named as grantor in the body of the deed. (*Mesick v. Sunderland*, 6 Cal. 297; *Ingolsby v. Juan*, 12 Id. 564; *Carr v. Williams*, 10 Ohio, 308.)

NORTON, J. delivered the opinion of the Court—FIELD, C. J. and COPE, J. concurring.

This is an action of ejectment, in which the plaintiff claims title through a decree of foreclosure of a mortgage claimed to have been executed by one McMillan and his wife upon the premises in question. The defendant claims under a lease from McMillan and wife.

On the trial, the plaintiff offered in evidence the record of the foreclosure proceedings, to which the defendant objected, on the ground that it appeared that no summons had been issued in the case, and no evidence was given of an authority to the attorney who put in an answer for the defendants. The authority of an attorney-at-law to appear will be presumed where nothing to the contrary appears. The question whether a married woman could alone authorize an attorney to appear for her does not arise, inasmuch as the appearance in the case in question was for both husband and wife. Although the action is said, by section twenty-two of the Practice Act, to be commenced by the filing a complaint and issuing a summons, yet by section thirty-nine it is provided that 'a voluntary appearance shall be equivalent '[55] to personal service of the summons. Putting in an answer is an appearance; and such an appearance must be held to be a waiver of the mere formality of issuing a summons, the service of which in such case becomes unnecessary. The only purpose of the summons is to bring the defendant into Court. It is constantly said by Courts, when actions are commenced by the service of process, as by *capias ad respondendum*, that a voluntary appearance waives all defects of process, even when objection is taken in the same action.

Under our practice, the plaintiff, by filing his complaint, goes himself into Court; and although he may not choose to take out a summons, we think he cannot object to the defendants coming in and answering the complaint any more than he could object to the defendant's voluntary appearance after the plaintiff had taken out a summons which he did not choose to serve. Quite as little can the defendant in a collateral action object that there was no action pending after having voluntarily put in an answer to the complaint on file.

It is objected that the mortgage was not duly executed by the wife and her husband so as to bind the property; but all inquiry into that subject is concluded by the decree of foreclosure and sale in an action to which the persons executing the mortgage were parties.

Judgment affirmed.

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### HOLMES v. HORBER.

**FORCIBLE ENTRY AND DETAINER—RENTS AND PROFITS.**—In an action of forcible entry and detainer, the value of the rents and profits of the premises is not required by the statute to be stated in the complaint, and without such statement may be awarded as damages.

**APPEAL** from the County Court of the City and County of San Francisco.

The complaint in this action claimed as damages the rents and profits of the premises detained, but in regard to their value only alleged "that the monthly value of the premises is — dollars."

The Court found the monthly value to be seventy-five [56] dollars, \*and rendered judgment for treble the amount accruing during the period of detention at that rate. Defendant appeals, alleging this as error.

*John Reynolds*, for Appellants.

*W. W. Chipman*, for Respondent.

COPE, J. delivered the opinion of the Court—FIELD, C. J. and NORTON, J. concurring.

This is an action of forcible entry and detainer. The necessary facts are alleged in the complaint and found by the Court, and the judgment is in accordance with the pleadings and finding. It is objected that the Court erred in awarding as damages the value of the rents and profits, such value not being stated in the complaint. We are of opinion that no error was committed in this respect, as the statute does not require the value to be stated

Judgment affirmed.

## CITY AND-COUNTY OF SAN FRANCISCO-v. PIXLEY *et al.*

<sup>1</sup> SALE IN MASS, INVALID.—A sale in mass, under a writ of execution, of real estate, consisting of several known and distinct parcels, at a price greatly below the actual value of the property cannot be sustained against the objection of the judgment debtor.

IDEM—NOT VOID, BUT VOIDABLE.—Such sales are not absolutely void, but are voidable, and will be set aside upon reasonable and proper application, when there is reasonable ground for belief that they were less beneficial to the creditor or debtor than they would have been had a different mode been pursued.

IDEM—WHEN MAY BE SET ASIDE.—Under an execution against the city and county of San Francisco, the Sheriff sold a tract of land, belonging to the corporation, one mile in length and half a mile in width, which had, long previous to the sale, been laid out by the city authorities into blocks and streets of designated dimensions and boundaries, and marked upon the official map of the city; part of the land lay under the tide waters of the bay of San Francisco, and the dry land was intersected by a navigable stream. The property was sold in mass for three hundred and sixty dollars, and was worth at the time about \$75,000: Held, that upon application by the judgment debtor, the sale was properly set aside, on account of the manner in which it had been made.

SETTING ASIDE EXECUTION SALE.—When the application to set aside a voidable sale under execution should be made by motion and when by bill in equity, discussed.

\*APPEAL from the Fourth Judicial District.

[57]

The facts are-stated in the-opinion.

*S. Heydenfeldt*, for Appellant.

<sup>1</sup> Cited as authority in *Blood v. Light*, 33 Cal. 654; see also *Hunt v. Loucks*, 33 Cal. 232; *Vigoreux v. Murphy*, 54 Cal. 351; *Hilberd v. Smith*, 67 Cal. 565. See 13 Wall. 514.

*Hoge & Wilson*, for Respondent, cited Pr. Act, sec. 223; *Jackson v. Newton*, 18 Johns. 356; *Cunningham v. Cassidy*, 17 N. Y., 276.

FIELD, C. J. delivered the opinion of the Court—COPE, J. and NORTON, J. concurring.

This is a suit on the equity side of the Court to set aside a sale of certain real property, made under execution issued upon a judgment against the city of San Francisco. The facts of the case, so far as they are material for the determination of the appeal, are as follows: In January, 1856, James Haslett recovered a judgment in the late Superior Court against the city of San Francisco for about \$1,020. Upon this judgment the sum of five hundred and twenty-five dollars was collected and credited. Afterwards the judgment was assigned by Haslett to the defendant McMinn, and by McMinn to the defendant Reese. Upon the abolition of the Superior Court, the record and judgment were, by operation of law, transferred to the District Court; and subsequently, by order of that Court, the judgment was revived against the existing corporation—the City and County of San Francisco—as the successors of the former municipal corporation. Some question is made as to the efficacy of the proceedings for the revival of the judgment, which we do not consider important to notice. In December, 1857, execution was issued for the balance due upon the judgment, and several tracts of land were sold thereunder by the Sheriff. One of them is bounded, according to the official map of the city and county, as follows: “On the west by Folsom Street; on the north by the south side of Tracy Street extended eastwardly to the eastern front of the city of San Francisco as fixed by the Legislature of 1851; on the east by ships channel in the bay of San Francisco; and on the south by the north line of Corbett [58] Street extended eastwardly to ships \*channel in the bay.” This tract was bid off by the defendant Pixley, for the sum of three hundred and sixty dollars. In making the bid, Pixley acted simply as the attorney of one Pearson, and by direction of Pearson he assigned the certificate of sale received from the Sheriff to one Wheeler, a clerk in the office of Pearson. It is unnecessary to allude to the other tracts

sold, as from the decision of the District Court setting the sale aside, Pixley and Wheeler alone appeal. So far as Pixley is concerned, the appeal is not seriously prosecuted; nor, indeed, could he be allowed to urge any objections to the decree, for he disclaims in his answer all interest in the subject matter of the suit, and the decree does not charge him with costs. The appeal must be considered, therefore, as prosecuted by Wheeler alone, and must be determined upon the regularity and validity of the sale of the tract described.

This tract is about a mile in length by half of a mile in width; and was, long previous to the sale, laid out by the city authorities into blocks and streets of designated dimensions and boundaries, which are marked on the official map of the city. Part of the land lies under the water, and the dry land is intersected by Mission Creek, which is a navigable stream. The whole tract was sold in one entire mass, without regard to the natural divisions made by the creek, or the divisions into blocks and streets as plotted on the official map, or to the fact that part of the land lies under the tide waters of the bay. It is alleged by the plaintiff, that the entire tract was worth at the time about \$75,000; and it is evident that the different parcels, into which it is divided, might have been sold separately at prices approximating in the aggregate this statement of the value of the property, and that several of the parcels sold separately would have produced an amount exceeding the sum bid.

A sale in this manner of several known parcels at a price greatly below the actual value of the property cannot be sustained against the objection of the judgment debtor. A sale in mass of several distinct known parcels is against the express direction of the statute, which, in its provision in this respect, affirms a rule previously prescribed by the almost uniform decisions of the Courts. (Pr. Act, sec. 223.) Many persons might be disposed to bid for separate parcels of a particular tract who have neither the wish nor \*the. [59] means to acquire the whole tract. Such sales are, therefore, generally condemned, as tending to the sacrifice of the property of the debtor, and his consequent oppression. "They are," says Mr. Chief Justice Spencer, "not to be

countenanced or tolerated. They are oppressive and unnecessary." (*Jackson v. Newton*, 18 John. 356.) It has, in consequence, been almost a matter of course to set such sales aside upon the application, within a reasonable time thereafter, of the debtor or parties interested in the premises, and proof of actual or probable loss from the course pursued. Such sales are not, indeed, absolutely void. Cases may occur where a sale in this manner would be more beneficial to the debtor than a sale of the parcels in detail; also where a division, though actually existing, may not be so well known and notorious as to require its recognition by the Sheriff and bidders. But where the property consists of distinct and well known parcels, such sales are voidable; and upon seasonable and proper application, when there is reasonable ground for belief that they were less beneficial to the creditor or debtor than they would have been had a different mode been pursued, the Court will not hesitate to set them aside. (*Cunningham v. Cassidy*, 17 N. Y. 276.)

Whether the application for relief should be presented by motion to the Court or by bill in equity will depend upon the special circumstances of the particular case. In *Bryan v. Berry*, 8 Cal. 135, this Court approved of the rule laid down by the Supreme Court of Illinois in *Day v. Graham*, 1 Gillman, 435. In the latter case, the Court, after citing several authorities, said: "Upon these authorities we are of opinion that when the plaintiff in the execution is the purchaser, and before he conveys to another, the Court will set aside the sale upon motion. But after he conveys to a third person and when a third person becomes a purchaser, the Court will not determine in this summary way questions which may affect the rights of others not before the Court, and without opportunity of explaining away those circumstances which might destroy his title." The case at bar differs from that of *Day v. Graham* in this: that there a deed had been executed by the Sheriff; but here no deed has been executed upon the sale, but merely a memorandum or certificate—a deed, [60] under our statute, only following in case a \*redemption is not made within six months thereafter. Whether the rule for this reason should be in any respect modified, it is unnecessary to express any opinion. No question was



made on the argument as to the mode in which relief is sought in the present case, by bill in equity.

Judgment affirmed.

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## TEWKSBURY v. O'CONNELL.

**CONTRACT WITH MUTUAL COVENANTS, TO BE EXECUTED BY ALL.**—A contract, purporting to be made between several parties, containing mutual covenants of which those of one party are the consideration of those of the others must, to be valid, be executed by all, and cannot be enforced against one executing, by another who fails to execute.

**DEED OF TENANTS IN COMMON, HOW EXECUTED.**—Thus, where a number of tenants in common were parties to a deed of partition, by the terms of which each party conveyed and released his undivided interest in the whole premises in consideration of the conveyance to him of the undivided interests of the others in a specified portion, and the deed was signed by a large proportion of the parties, but not by all: *Held*, that as a conveyance it was void as to those who did sign, and that they still retained their interests as tenants in common in the whole tract.

**DEED OF PARTITION, HOW MADE EFFECTUAL.**—Where a deed of partition is invalid as a conveyance, by reason of its non-execution by some of those who are parties to it, it may become effectual by the parties taking and holding in severalty in pursuance of its terms and dealing with their respective portions as if owned in severalty, but such acts of ratification do not operate to make the deed a valid conveyance, but only by way of estoppel or as a determination of boundaries and only upon the interests of those performing them. A party who signed the deed is not estopped from insisting upon its invalidity by reason of any acts of ratification either of the others who did execute or of those who failed to execute.

### APPEAL from the Seventh Judicial District.

The agreement of partition upon the validity of which the decision is placed commences as follows:

“This agreement of partition and release, made this fourteenth day of July, A. D. 1856, between John H. Saunders, H. P. Hepburn, and Eugene Musson, of the city of San Francisco, in the State of California, of the first part;

“Martina Castro de Alvarado and Juan B. Alvarado, her husband, David Goodale and Henry Benson, of Contra Costa County, of the second part; [61]

“Antonio Castro, José Ramon Castro, John Provizzo, John Davis, Mancilla B. Bradley, by his attorney in fact, J. M. Tewksbury, Lyman King, and C. P. Pollard, of the third part;

<sup>1</sup> *Emerte v. Alvarado*, 64 Cal. 574, 577, 578, 579. See 10 Nev. 134.

"Juan José Castro and Petra Bernal de Castro, his wife, Thomas J. A. Chambers, Dennis S. Perkins, Lyman King, Ann R. Millson, and John Millson, her husband, John Searle, C. P. Pollard, and Thomas P. Madden, of the fourth part;

"Gabriel Castro and Marcellina Felix de Castro, his wife, James T. Dean, Mancilla B. Bradley, by his attorney in fact, J. M. Tewksbury, and Henry Mentz, of the fifth part;

"Joaquin Y. Castro and Trinidad Pacheco de Castro, his wife, Martina Pene, by her attorney in fact, William Smith, Thos. J. A. Chambers, and Emilio Espinosa, of the sixth part;

"Victor Castro and Felicidad Carillo de Castro, his wife, H. L. Ford, William H. Gray, Wilhelmina C. C. Quilfelt, David Goodale, John H. Dall, E. W. Leonard, and John B. Frisbee, of the seventh part;

"Henry Wilkins, of the eighth part;

"Francisco Moraga, José Moraga, Thomas J. A. Chambers, Gustave Touchard, Francisca Martinez de Soto and Angel Soto, her husband, Merced Martinez de Welch and Enrique Welch, her husband, Wilhelmina C. C. Quilfelt, and Henry Wilkins, of the ninth part—owners, or having rights and interests in or liens upon the rancho of San Pablo, situate in the county of Contra Costa, State of California, containing five square leagues of land, more or less, and bounded and described as follows."

The provisions of this agreement are stated in the opinion of the Court, and more fully in the report of the case of *Tewksbury v. Provizzo*, 12 Cal. 20.

The Court below found the following facts:

"1. That the lands sued for are part of the Rancho San Pablo.

"2. That at and prior to the fourteenth of July, 1856, the grantors of both plaintiff and defendant, were seized in fee simple of undivided interests and estates, as tenants in common between themselves and others in said Rancho de San Pablo; that, on that \*day, a written agreement, under the hands and seals of both plaintiff's and defendant's grantors, and certain others, tenants in common in said rancho, was entered into, executed, and acknowledged by said grantors of plaintiff and defendant, and some others, as such tenants in common, and delivered to James A. Forbes,

John B. R. Cooper, and Nicholas Gray, in such agreement named, as Commissioners, to make partition of the lands of such rancho.

"That said agreement was not executed, acknowledged, or delivered, either by one Joseph Emeric, a tenant in common in said rancho, (not named in said agreement,) nor by one James T. Dean, Francisca Martinez de Soto, and Merced Martinez de Welch, or the respective husbands of the two latter—all five of whom were named in the body of said agreement as contemplated parties thereto, and who were therein recited as part of the owners, or having rights and interests in or liens upon the Rancho de San Pablo.

"3. That after the execution, acknowledgment, and delivery of said agreement of partition in manner aforesaid, said Commissioners caused a survey and map of the rancho to be made, and thereupon made an allotment and partition of the lands thereof to the plaintiff's and defendant's grantors and others, parties named in said agreement, and made report of their proceedings, partition, and allotment of the lands of said rancho, and caused said agreement for partition, the survey and map of said ranch, together with their said report, to be filed and recorded in the Recorder's office of the county of Contra Costa, as provided in said agreement.

"4. That, subsequent to said acts of survey, map, allotment, and report, and record thereof as aforesaid, made by said Commissioners, and before the commencement of this suit, the plaintiff and defendant derived respectively from these several grantors, who were parties to said agreement, through duly executed and delivered mesne conveyances, their several respective interests or rights, in and to the lands of said rancho.

"5. That the lands in complaint described were, by said Commissioners, allotted to and set apart to the plaintiff's grantors."

The final decree declares the partition void, restrains plaintiff perpetually from proceeding further in this action, and orders him \*to pay costs taxed at \$931 84. A mo- [63] tion for a new trial was made, and denied; and thereupon this appeal was taken from the judgment and order overruling motion for a new trial.

*George Cadwalader*, for Appellant.

The agreement of partition has, necessarily, a multifarious character. It is to operate as an authority to certain Commissioners; as a release of certain claims due for defending the title; as a partition of the Rancho San Pablo (with a few minor exceptions) into seven equal parts in value, and one unequal part; and as a release and conveyance from the various nine parties thereto to each other of the different parts; and it also contains a covenant that all sales made by parties thereto shall be subordinate to the agreement.

It has been delivered, the authority executed, and the report thereof, with the agreement, duly recorded, which, *eo instanti*, gave to each of the nine parties in severalty, the particular lots of land assigned them by the Commissioners, with the consequent right, as declared by this Court, in *Tewksbury v. Provizzo*, 12 Cal. 20, of maintaining ejectment therefor.

In that case the Tewksbury mentioned is the plaintiff in this case, while the defendant O'Connell, in this cause occupies a position similar to that of Provizzo in 12 Cal. 20. In that case the agreement of July 14th, 1856, was before the Court, and its character in a measure determined, if not wholly, by a full Bench.

In that case the Court said, (and it applies with equal force to this case): "Important rights have vested under these proceedings, which a Court would not disturb without great reluctance."

The failure of some parties to sign cannot possibly affect those who did sign. The instrument is just as binding on them as if all had signed. When it was delivered it became their deed, and as such, when recorded, operated as a transfer of the title that they had, and to no greater extent. (*Cayton v. Walker*, 10 Cal. 450; *Cutter v. Whittemore*, 10 Mass. 142; *Dore v. Covey*, 13 Cal. 502; *Smith v. Van Nostrand*, 5 Hill, 420; 1 Story's Eq. Jur. sec. 656; 17 Vesey, 544; 1 Texas, 181.)

The parties who did not sign the agreement could ratify or validate the proceedings thereunder, either by express [64] ratification or acceptance of the land allotted to them, or a sale of the land by them to persons who

had signed and were bound by the agreement. (*Jackson v. Richtmyer*, 13 Johns. 367; 16 Id. 313; 2 Caines, 169; *Colton v. Smith*, 11 Pick. 311; 23 Id. 1; *Mount v. Morton*, 20 Bar. 123; *Baker v. Lorillard*, 4 Com. 257; *Tabler v. Wiseman*, 2 Ohio, State, 207; 1 Wharton, 292; 16 N. Y. 193; 3 Paige, 470.)

*Eugene Casserly*, for Respondent.

I. The instrument being a deed of nine parts, and for a partition by Commissioners, and not having been executed by all the parties to it, and having remained unexecuted, was without effect in law for want of mutuality, and for the purposes of this action was wholly void.

The instrument, the Court will observe, was intended to be: 1. An agreement for a partition of the Rancho San Pablo, upon a submission to three commissioners; and, 2. A deed of release from every one to all the others, to operate as soon as the Commissioners should have filed their report and allotment.

In either and both of these aspects, the consideration to each of the parties for the execution of it by him, is the execution of it by every other party, and the release to him by every other of his interest or right in the part to be allotted to him in severalty by the Commissioners. Each one is a grantor and a grantee. The grantor to, and the grantee of, all the others. Not a part, but all. Upon that consideration he grants, and not otherwise. Each one is an actor to make partition, if all the others named as parties are likewise. In the present case, the parties being very numerous, cannot execute all at once, or all on the same day; but the execution by the whole is necessarily a continuous act. It is, however, an entirety, for *non constat* that any one would ever have become a party but that the others were to become parties. And in the case of so many parties, the operative delivery does not take place as fast as each party signs; for necessarily in the course of the numerous signatures, much time is consumed, and the instrument passes many times from hand to hand. It cannot take place until after all the parties have signed; unless when less than all, having signed, \*consent legally that it may be delivered sooner. But [65]

this must be distinctly proved; the presumption of law being that such an instrument is not to take effect until after all the parties have signed.

Mutuality of obligation is of the essence of all such contracts. Without this the consideration fails; for without this the effect and operation of the instrument are not what each party intended and had a right to expect; or what he proposed to himself and all the others. And instead of each party having his land in severalty he continues to hold it in common and undivided, at least with all those who failed to execute.

There is, consequently, no complete partition, and none even as to the parties to the instrument; because that is no partition which any party to it (the instrument) may disregard in fact and overthrow by law. That which the instrument, on its front, declares to be its object—"to settle all disputes touching said rancho," is not attained, for instead of settlement of the old disputes, new disputes are introduced by an attempt at a partition, which is adhered to by one man, and rejected by another.

If five or six parties named in the deed, out of forty, may omit to execute, without avoiding it, so may twenty or thirty, or any number less than the whole. Those who did not sign may be the very parties who have nearly the whole interest in fee; and those who do sign may be one owner of a large share in fee, and the rest merely owners of a trifling interest in fee and incumbrancers who have nothing to partition. What effect can possibly be given to such an instrument? Why should it bind the one large owner who signed, evidently with the expectation that the other principal owners would sign also?

Until all those intended to be bound by a deed *inter partes* have executed it, it remains inoperative, and it is immaterial whether there is or not an express condition to that effect. For, in the signing by each party, the law implies the condition that the instrument shall not take effect, unless and until all the others shall have executed it. (*Townsend v. Corning*, 23 Wend. 435; *Livingston v. Rogers*, 1 Caines, 584; *Emery v. Neighbour*, 2 Halst., C. L., 145; *Bean v. Parker*, 17 Mass. 603; *Burhans v. Burhans*, 2 Barb. Ch. 398; *Jackson v. Brown*, 3 Johns. \*459.

\*II. Besides being intended to operate as a deed of [66] grant and release by and between all the parties named therein, the instrument has another aspect, important to be specially considered. It is an agreement to submit to three Commissioners, chosen by the parties, the partition of the rancho, the division of it into the requisite number of equal parts, and the allotment of these parts among the parties entitled; their report to be completed within three months from the delivery of the agreement to them, except as provided, etc.

This makes the agreement a submission of the partition to the arbitration of the Commissioners; makes them arbitrators, and their report an award—the whole being subject to the rules of law applicable in such cases. (1 Atk. 63; 2 Id. 504; *Hawkins v. Colclough*, 1 Burr. 274; *Garr v. Gomez*, 9 Wend. 661; Kyd on Awards, 21; Bac. Abr. tit. "Arbitrament" B; Russell Arbit. \*49–50, 63 Law Lib.; *Browne v. Meverill*, Dyer, 217a; *Johnson v. Wilson*, Willes, 248; *Van Cortlandt v. Underhill*, 17 Johns. \*405; *Jackson v. Ambler*, 14 Johns. 96; *Shepard v. Ryers*, 15 Johns. 502; East. 15; 4 Dallas, 20; *Jones v. Totty*, 1 Sim. 136–7, 2 Eng. Chan.; *Manners v. Charlesworth*, 1 Myl. & K. \*332, 7 Eng. Ch.)

Of this law of arbitration the most leading principle is, that every agreement of submission shall be mutual and obligatory upon all who are named in it as parties to be bound; so that the failure of any one of the parties to execute it so as to bind him, shall make it void as to all, as well those who execute as those who do not. (*Antram v. Chace*, 15 East. 209; *Soprani v. Skurro*, Yelv. 18; *Britton v. Williams' Devises*, 6 Munt. 453; *Biddell v. Dowse*, 6 Barn. & Cress. 255; Trin. Term, 28 Car. 2; 1 Cha. Ca. 279; Viner Abr. "Arbitrament"; *Ferrer v. Owen*, 7 Barn. & Cress. 427; *Marsh v. Rowe*, 9 Id. 659; *Hodson v. Harridge*, 2 Saund. 611, note a; *Brazier v. Jones*, 8 B. & Cress. 124; *Dilley v. Polhill*, 2 Strange, \*923; *Eastman v. Burleigh*, 2 N. H. 486; *Furbish v. Hall*, 8 Greenl. 315; *Rumsey v. Leek*, 5 Wend. 20; *Keep v. Goodrich*, 12 Johns. 397; *Tucker v. Woods*, Id. 190.)

NORTON, J. delivered the opinion of the Court—FIELD, C. J. and COPE, J. concurring.

[67] \*This is an action of ejectment, brought to recover certain premises which are a part of a tract of land called the San Pablo Rancho. The defendant claims to be the owner of the undivided one-twenty-fourth part of the rancho. After setting up this title and denying the plaintiff's asserted title, the defendant for a second answer sets up, as an equitable defense, that the plaintiff claims title in severalty to the demanded premises under and by virtue of a certain agreement for a partition of the San Pablo Rancho, and which agreement and the proceedings taken under it the defendant charges are void, and asks to have them so adjudged. The plaintiff in his replication admits that he claims title in severalty under that agreement, and asserts the validity of the agreement and the proceedings under it. The issue arising out of this so-called equitable defense was tried separately, and a judgment rendered that the agreement was void as against the defendant and his grantors, and enjoining the further prosecution of the action by the plaintiff to recover the demanded premises. The plaintiff appeals from the judgment and from an order denying a motion for a new trial.

On the trial, the plaintiff offered in evidence the above-mentioned agreement for partition. Objection was made to its admissibility, on the ground that it had not been executed by John T. Dean, Francisca Martinez de Soto, Merced Martinez de Welch, and José Ramon Castro, who were named as parties to it, nor by Joseph Emeric, not named as a party, but who is said to be admitted by the pleadings to be interested in the rancho. This objection was sustained, and the proffered evidence excluded, to which ruling the plaintiff excepted.

The defendant's title was derived from Victor Castro and E. W. Leonard, by a deed made after the date of the partition agreement, which agreement was signed by them. No question is made but that this agreement is valid against the defendant, if it was valid against his grantors. The first point, therefore, which arises in the case, is whether this agreement is valid and binding against those who executed it, although it has not been executed by others who are named in it as contracting parties, and who are declared in it to have interests in the land proposed to be partitioned.

[68] \*The agreement is between nine parties, and each



party consists of several persons. It provides that three persons named as Commissioners, after setting apart and allotting portions of the rancho to the parties of the first and second parts, shall divide the residue into seven equal parts, allotting one part to each of the remaining seven parties, and then each party releases and conveys to the others all his title and interest in the portions of the rancho not assigned to him. The grantors of the defendant are among the parties of the seventh part; José Ramon Castro, who did not execute, is one of the parties of the third part; and Francisca Martinez de Soto and Merced Martinez de Welch, whose signatures were affixed by a person who, it appears, had no authority so to do, and who are therefore deemed not to have executed, are among the parties of the ninth part. The Commissioners made the partition and allotment as provided by the agreement, except in some particulars not important to consider in this connection. The plaintiff claims that, upon such allotment being made, the agreement took effect as a release and conveyance, by those who executed it to the other parties, of all their title and interest in the parts allotted severally to those other parties; and thus that the grantors of the defendant have conveyed to the grantors of the plaintiff all their title to that portion of the rancho allotted to the plaintiff's grantors, and which embrace the demanded premises. If this be so, the result will be that the defendant's grantors have parted with their undivided interest in the whole of the rancho except that portion allotted to them, but have not a complete title in severalty to the portion allotted to them, inasmuch as the agreement and the proceedings under it can have no effect to transfer to the defendant's grantors the undivided interest in the portion allotted to them which belonged to the parties who did not execute the agreement. The defendant claims that the possibility of such an injustice is a conclusive argument in support of his position that an agreement like the one in question, between several parties, where performance by one is the consideration for the performance by the other, could not be intended to be, and cannot legally be held to be, binding upon any party until executed by all. In support of the defendant's position, the case of *Townsend v.*

*\*Corning*, 28 Wend. 435, is cited, in which Judge Bron- [69]

son says: "A writing *inter partes* is prepared, by which one party is to covenant for the payment of money and the other for the conveyance of lands—each of these mutual covenants being the consideration for the other. One party sits down and executes; but the other stops short, and, for some cause, no matter what, does not execute the instrument. It is impossible, I think, to maintain that the party who has refused or neglected to bind himself can set up the instrument as a binding contract against the other party. There was, I think, a condition implied from the nature of the transaction, that the signing of one party should go for nothing unless the other signed also. But whether I have assigned the proper reason for the rule or not, the conclusion to which I have arrived, that the party who signs cannot be bound where the execution is thus incomplete, is not only in accordance with the justice of the case, but is well supported by authority." (See also the cases of *Livingston v. Rogers*, 1 Caines, 584, and *Emery v. Neighbour*, 2 Halstead Com. L. 145.) These authorities fully sustain the defendant's position. In the absence of any circumstance other than what appears on the face of the instrument, we think it cannot be held that this agreement was executed by the plaintiff's grantors and delivered to take effect like a deed poll, upon their affixing their own signatures, but that it was an inchoate instrument, only to become effective when executed by all the persons named as parties. Certain cases are cited by the plaintiff, in which instruments have been held operative when not executed by all the parties. Without entering into a separate examination of each case, it will suffice to say that they are cases in which, from the terms of the instrument, or from the nature of the subject-matter of the contract, it appeared that it was the intention of the parties who signed to be bound, without reference to an execution by all the parties; or where, by acting under it with a knowledge that it had not been fully executed, the parties had become estopped from denying its obligation upon them. Considered, therefore, as a conveyance, we think the agreement in question was void as against the defendant's grantors, and gave no title to the grantors of the plaintiff.

[70] \*But it is said that a partition, though not effected by a valid deed of conveyance, may become effectual

by a ratification or adoption; and it is claimed that the parties who did not execute this agreement have adopted and ratified the partition made under it, and that thus the partition has become complete, and each of the parties become invested with the full title in severalty to the portions allotted to them respectively. Undoubtedly there are many cases in which partitions made by parol or by defective instruments have been held to have become effectual by the parties taking and holding in severalty, in pursuance of their terms, and dealing with their portions as if owned in severalty. Whether this occurs upon the ground that partition is not strictly a transfer of title, but only a determination of boundaries, which does not require to be effected by deed, or whether it rests upon the principle of estoppel, by which a party who takes the benefit of such a transaction is forbid to say it was not duly effected, is not material to inquire. It may be conceded that the parties who did not sign the agreement have so acted in relation to the property since the partition that, if they should bring an action to recover their former interest in a portion of the ranch not allotted to them, they might be estopped from denying the partition; but does that either show that the agreement is binding in itself upon the defendant's grantors, and a good deed by them, or that *they* are estopped from denying the partition? They have done nothing to ratify or adopt the partition, and nothing appears in the case to bind them to abide by it, unless they are bound by the agreement. They become parties to a written instrument, by which they agree that their undivided interest in certain portions of the rancho shall be transferred to other persons, upon condition (for such we deem to be the effect of the agreement) that such other persons shall also become parties to that agreement, and by the agreement convey to them in severalty a portion of the rancho equivalent to the undivided interest to be surrendered by them. They did not agree that their undivided interest should be transferred on any other terms than that an interest in severalty should be conveyed to them by the operation of that same instrument. This has not been done, and hence the instrument is not operative as against \*them, and they have in no other manner transferred [71]

their undivided interest in the rancho, nor done any act by which they are estopped from asserting their title to an undivided<sup>1</sup> interest in the whole rancho. All the rights which the defendant's grantors had in this respect, at the time of their conveyance to him, have vested in and may be asserted by him.

We are pressed with the consideration that many third persons may have acquired supposed interests in severalty under the various parties to this partition agreement, and that for this reason it should be sustained. Such considerations are always regarded by Courts as far as they can be without violating legal principles; and it is under such influences that the Courts have gone very far to uphold parol partitions and to apply the doctrine of estoppel. But we have no power to give vitality to void contracts, or to create estoppels where none have arisen from any act of the parties sought to be estopped. Such, we think, would be the effect of a decision that the defendant or his grantors had parted with or are estopped from asserting the title to an undivided interest in the San Pablo Rancho, which it is conceded they had at the date of that agreement.

The judgment must be affirmed.

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### FRISCH *et al.* v. CALER *et al.*

**COMPLAINT ON NOTE—ALLEGATION MATERIAL.**—In a complaint upon a promissory note an allegation of its nonpayment is material, and if omitted the complaint is demurrable. The averment that there is a certain amount due upon the note is insufficient, being a statement of a mere conclusion of law.

**<sup>1</sup> PLEA OF PAYMENT DEEMED CONTROVERTED.**—A plea of payment in an answer to a complaint upon a promissory note is not new matter, and was not, under the former practice requiring a replication to new matter, admitted by a failure to reply.

**NEGATIVE ALLEGATIONS.**—Where a negative allegation is necessary in stating the cause of action, although it must, of course, precede an averment by the opposite

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<sup>1</sup> Commented on in *Goddard v. Fulton*, post 436; cited as authority in *Woodworth v. Knowlton*, 22 Cal. 168; *Fairchild v. Ainsborough*, Id. 575; and see *Mulford v. Estudillo*, 23 Cal. 100; *Brown v. Orr*, 29 Cal. 120; commented on in *Davanay v. Eggenhoff*, April T. 1872 (not reported); and see also *Hook v. White*, 38 Cal. 300; *Welmore v. San Francisco*, 44 Cal. 800; *McGuire v. Quintana*, 52 Cal. 427; *Harmon v. Ashmead*, 60 Cal. 441; 43 Cal. 397.

party of the fact negatived, it nevertheless constitutes the basis of the issue joined by the subsequent averment, and the latter operates as a traverse and not as an averment of new matter.

### APPEAL from the Fourth Judicial District.

\*The complaint, which was verified, contains two [72] counts—one for goods sold and delivered, and another upon a promissory note. The latter, after stating that in consideration of an antecedent indebtedness the defendants executed to plaintiffs their promissory note for six hundred dollars, with interest, continues as follows: "That said defendants, Feb. 25th, 1861, paid on said note three hundred dollars, and there is now due said plaintiffs from said defendants the said balance on said note, of three hundred dollars, and forty dollars interest, wherefore, etc."

No demurrer to the complaint was interposed. The answer, also verified, denies all indebtedness on account of goods sold and delivered; admits the execution of the note, and avers that it has been paid by defendants, except the sum of one hundred dollars, which is admitted to be still due upon it.

No replication was filed by plaintiff. A jury trial was had, resulting in a verdict for plaintiffs for the amount claimed in the complaint; in accordance with which judgment was entered, from which the appeal is taken by defendants.

*Cook, Brownson & Hittell*, for Appellants.

The plea to the second count sets up new matter; and as no replication was filed, such new matter was to be taken as true. It constituted a material allegation within the meaning of the sixty-fifth and sixty-sixth sections of the Practice Act.

That the plea to the second count did set up new matter we think clear from all the authorities. Gould in his work on Pleading (sec. 195) says: "All facts alleged in pleading which go in avoidance of what is before pleaded on the other side are called *new matter*." The plea of payment in the answer went *pro tanto* in avoidance of the complaint. This is plain from a consideration of the evidence which it would be necessary to adduce in a case of the kind. The plaintiff would be required to prove his claim, and no presumption of payment would arise until after the expiration of the period provided in the Limitation Act.

The burden of proof of nonpayment, even though pleaded by the complaint, would not be on the plaintiff. Payment could not be proved under a general denial. It is strictly a matter of defense.

[73] \*There is a case in one of the New York Reports (*Van Giesen v. Van Giesen*, 10 N. Y. 316) in which a contrary doctrine seems to have been held. It was a suit on a note, and the Court said: "The material allegations of the complaint in this case are: the making by the defendants of the promissory note, the transferring it to the plaintiff, and the nonpayment of it by the defendants."

The Court here was evidently wrong in saying that the nonpayment of it by the defendants was a material allegation; it might be stricken from the complaint without leaving it insufficient. The ordinary forms of declarations do not contain such an allegation. (See 1 Chitty's Plead. 723.)

And afterwards the same Court in *McKying v. Bull*, 16 N. Y. 297, reviewed the whole subject, and came to conclusions which sustain us throughout.

Referring to *Van Giesen v. Van Giesen* the Court say: "That case simply decided that where the complaint contained an averment of new matter, a plea of payment formed a complete issue," and go on to say, "that neither payment or any other defense which confesses and avoids the cause of action can in any case be given in evidence as a defense under an answer containing simply a general denial of the allegations of the complaint."

This shows conclusively that the allegation of nonpayment was not a material allegation in the complaint.

But perhaps it is not necessary to look further than the complaint in this case, where it will be seen that the respondents themselves did not consider an allegation of nonpayment material, and as a matter of fact made no such allegation.

The only thing said on the subject in the complaint is, that "there is now due said plaintiffs from said defendants the said balance on said note, of three hundred dollars, and forty dollars interest." Not a word about nonpayment; not a word to bring it within the case of *Van Giesen v. Van Giesen*, even taking that decision without the important qualification made

to it in *McKying v. Bull*. (See also *Piercy v. Sabin*, 10 Cal. 22, and cases there cited.)

*Porter & Sawyer*, for Respondents.

Under the Practice Act a complete issue was made by an aver-<sup>\*</sup>ment in the complaint of nonpayment and [74] the allegation of payment in the answer. Such an allegation is not of new matter, and no reply is necessary. (Pr. Act, secs. 36, 38, 46; *Van Giesen v. Van Giesen*, 10 N. Y., Court of Appeals, 316; same case, 12 Barb. 520.)

In *McKying v. Bull*, 16 N. Y. 297, the Court (see p. 304) say: The case of *Van Giesen v. Van Giesen*, "affirmed in this Court, contains nothing in opposition to the doctrine here advanced." Hence, *Van Giesen v. Van Giesen* is good law in that State and, we apprehend, elsewhere. In the latter case, the Court only decides that payment cannot be proved unless pleaded.

COPE, J. delivered the opinion of the Court—NORTON, J. concurring.

The proceedings in this case were had during the existence of the statute requiring a replication to new matter set up in the answer. The action is based in part upon a promissory note, and the question is, whether a plea of payment is new matter in the sense of the statute. New matter is that which admits the facts alleged as the grounds of relief, but avoids them by introducing a new subject of controversy, operating as a defense. It is necessary in an action on a promissory note to allege that the note has not been paid; and the plea of payment does not admit the allegation of nonpayment, but raises an issue as to its truth. The form of the plea cannot make that new matter which is merely responsive to the complaint; and to hold that a replication is required would be to hold that the allegation of nonpayment is an immaterial allegation. "A material allegation," says the statute, "is one essential to the claim or defense, and which could not be stricken from the pleading without leaving it insufficient." In an action for the breach of a contract, it is necessary to allege that the contract has been broken; and there is no difference in this respect between a promissory note and

other contracts. (1 Chit. Pl. 332.) The failure to pay constitutes the breach, and must be alleged; but so far as the proof is concerned, possession of the note is sufficient *prima facie* to sustain the allegation. (1 Van Sant. Pl. 226.) Being a material allegation, it is not new matter to aver [75] affirmatively the \*existence of the fact thus negatived in the complaint; for, obviously, nothing new is brought into the controversy. Whether matter is new or not, must be determined by the matter itself, and not by the form in which it is pleaded—the test being whether it operates as a traverse or by way of confession and avoidance. A plea tendering no new issue, but controverting the original cause of action, is a mere traverse, and as nothing new is involved in it, to call it new matter would be a misapplication of terms. It is not essential to a traverse that it be expressed in negative words—the form of the plea depending upon the allegation it is intended to meet; a negative allegation requiring an affirmative plea, and *vice versa*. New matter involves of necessity a new issue, or the introduction of a new ingredient as the basis of one, and a new issue can only arise upon a plea in confession and avoidance. An averment that a debt has not been paid, followed by a plea of payment, makes up an issue upon the point, and a replication would only amount to a reiteration of the negative already expressed. An issue is made up when a proposition is affirmed on one side and denied on the other, and it is immaterial whether the denial precedes or follows the affirmation. No proposition admits of more than one affirmative and one negative, and the order in which they are to be presented depends upon the nature of the proposition. Where a negative allegation is necessary in stating the cause of action, it must, of course, precede an averment of the fact negatived, but its position upon the record does not render it inoperative or useless. It constitutes the basis of the issue joined by the subsequent averment, and the latter operates as a traverse, and not as an averment of new matter.

This disposes of the only question raised in the case; but it is proper to suggest an objection to the complaint, which, though apparently technical, is of the essence of good pleading. The fact of nonpayment is not directly alleged—the



allegation being that there is now due, etc., which is a mere conclusion of law, and would not have stood the test of a demurrer. For the purposes of this appeal we have treated it as sufficient, and our object in alluding to it is to call attention to the matter and prevent the commission of similar errors in future.

Judgment affirmed.

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**\*PECHAUD v. RINQUET, ADMINISTRATOR, et al. [76]**

**JURISDICTION OF DISTRICT COURT.**—The District Court has jurisdiction in an action for the foreclosure of mortgages upon the estates of deceased persons, *Fallon v. Butler*, ante 24, affirmed.

**FORECLOSURE OF MORTGAGE AGAINST ESTATE.**—In an action in the District Court against an administrator to foreclose a mortgage, executed by the intestate upon lands belonging to the estate, no judgment can be entered up for any deficiency which may remain after the application of the proceeds of the sale to the mortgage debt.

**APPEAL from the Fifth Judicial District.**

The complaint alleged that Ives Kuzart executed to plaintiff a note and to secure the same a mortgage upon certain lands; that Kuzart had since died, and that the defendant, Rinquet, was his administrator; that the note and mortgage had been duly presented to the administrator, and by him, and also by the Probate Judge, allowed as a claim against the estate, and prayed judgment for the amount of the note, and that the mortgaged premises be sold and the proceeds applied to payment of the mortgage debt.

To this complaint the defendant demurred, on the ground that the District Court had no jurisdiction of the action. The demurrer was sustained, and final judgment rendered in favor of defendant, from which plaintiff appeals.

*O. Wolcott*, for Appellant.

*L. Quint*, for Respondent, cited *Falkner v. Folsom's Executors*, 6 Cal. 412.

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<sup>1</sup> See *Leviston v. Swan*, 33 Cal. 430.

FIELD, C. J. delivered the opinion of the Court—NORTON, J. concurring.

The judgment on the demurrer in this case is reversed and the cause remanded upon the authority of *Fallon v. Butler*, ante 24, decided at the present term. So far as the enforcement of the mortgage is concerned, the District Court had jurisdiction of the action; but no judgment can be entered up for any deficiency which may remain after the application of the proceeds of the sale—the claim arising upon the [77] personal obligation of the mortgagor having been \*duly allowed. The amount of any such deficiency will be payable, if at all, in the due course of administration, without any judgment of the District Court to that effect. Upon the filing of the *remittitur* in the Court below the defendants can have leave to answer the complaint.

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### GORDON v. WANSEY.

**ASSIGNMENT OF NOTE TO MAKER AMOUNTS TO PAYMENT.**—An assignment of a joint and several negotiable promissory note by the payee to one of the makers before its maturity amounts to payment, and the right of action against the makers is not revived by a subsequent assignment to a third person after maturity. If the subsequent assignment were made before maturity to an innocent person, a right of action would exist in his favor against the makers.

**ASSIGNMENT AS A DEFENSE.**—H. and three others executed to different persons negotiable promissory notes. Before the maturity of the notes the payees, for a valuable consideration, assigned them to H. After maturity H., for a valuable consideration, assigned them to plaintiff. In an action by plaintiff upon the notes against all the makers: *Held*, that the assignment to H. amounted to payment, and that, plaintiff having received the notes after their maturity, the defense was available against him. Whether plaintiff might maintain an action against his immediate assignor, not decided.

### APPEAL from the Seventeenth Judicial District.

The complaint sets forth seven joint and several promissory notes, each signed by Wansey, Shanter, Weiss & Howell, payable (except the first) sixty days after date, to different payees, or order, dated on different days in 1859, and avers that each of the notes was, on the same day on which it was

executed, assigned, for a valuable consideration, by the payee to Howell—one of the makers—and in 1861, for a valuable consideration, by Howell to the plaintiff, and judgment is prayed for the amount of the notes against all the makers.

The answer sets up actual payment in full of the first note, and claims that the other six were paid by the assignment to Howell.

The original answer further sets up in defense, that, the four \*makers were mining partners, and that, after [78] the assignment to Howell, and before his assignment to plaintiff, Howell became indebted to the mining partnership in an amount greater than that due upon the notes; but this defense was, on motion of plaintiff, stricken out by the Court.

Plaintiff admitted payment of the first note, and as to the other six, the case was submitted on the pleadings, and judgment rendered thereon for plaintiff for their full amount. From this judgment defendants appeal.

*McConnell & Garber*, for Appellant.

We submit, as one of the best established principles of the law-merchant, that where a negotiable note is paid by one of the makers it becomes *functus officio* satisfied and extinguished, and is no longer negotiable, and that the indorsement or assignment, after maturity, of the note so paid by one or more of the makers paying it can give no right of action to such indorsee or assignee, except as against such indorser or assignor.

And further, that the effect of this rule cannot be evaded by any change in the mere form in which the payment is made; that an indorsement or assignment of the note so paid by the payee or holder to one of the makers cannot serve to keep the note itself alive so as to confer any right of action in favor of the party making the payment or purchase of the note, or his indorsee or assignee as against his copromisors; that a payment by one of several makers is a payment by and for all; and an averment of an indorsement or assignment to one or more of the makers is substantially an averment of such payment as extinguishes and satisfies the note and the debt. (Story on Prom. Notes, secs. 180, 381-384; *Burridge v. Man-*

*ners* 3 Camp. 194; 1 Parsons on Cont. 214; Ross on Bills, 274, *Cullon v. Lawrence*, 3 M. & S. 97; *Beck v. Robley*, 1 Lord Mansfield; *Heald v. Davis*, 11 Cush. 318; *Long v. Bank of Cythiana*, 1 Litt., Ky., 291; *Lansing v. Gaines*, 2 Johns. 303; *Pray v. Maine*, 7 Cush. 253; *Wallace v. Branch Bank*, 1 Ala. 365; *Stevens v. West*, 1 How., Miss., 308; *Weatherd v. Smith*, 9 Tex. 622; *Cox v. Hodge*, 7 Black. 146; *Cochrane v. Wheeler*, 7 N. H. 202; *Hodman v. Rogers*, 6 Tex. 91; *Dana v. [79] Conant*, \*3 Vt., 1 Shaw, 246; *Tucker v. Peas Co.*, 36 N. H. 167; *Hopkins v. Farwell*, 32 Id. 425; *Story's Eq. Jur. sec. 499*; 2 Parsons on Cont. 358.)

*Hereford & Williams*, for Respondent.

"A negotiable note taken by the holder after its maturity is taken subject to all subsisting equities between the maker and payee, but not such as subsisted between the maker and any intermediate holder." (*Vinton v. Crow*, 4 Cal. 309.)

"The right of set-off against a note or bond does not exist for demands subsisting against intermediate assignees through whose hands such note or bond may have passed by blank indorsements or otherwise." (*Barbour on Set-off*, 1st ed. 114; *Stocking v. Snulman*, 3 Stewart & Porter, 35.)

COPE, J. delivered the opinion of the Court—FIELD, C. J. and NORTON, J. concurring.

This is an action upon seven promissory notes of which the plaintiff claims to be the holder by assignment. Six of these notes, payable to different parties, were assigned to one of the makers, and by him to the plaintiff. The first assignment was before and the second after maturity, and the question arises as to the effect of these assignments.

It is contended that the first assignment extinguished the notes, and that the subsequent transfer vested no right of action in the holder. The notes are payable to order, and, of course, are negotiable; but the complaint merely alleges that for a valuable consideration they were assigned, etc. Authorities are cited to show that a transfer of this character vests in the holder such rights only as he would acquire upon an assignment of a note not negotiable. This point is made with reference to certain matters relied upon as counter claims,

and is not important if it be held that the notes were extinguished by the first assignment. We are of opinion that the transaction amounted to payment, and that the notes became *functus officio*, and were not revived by the assignment to the plaintiff. If the rights of the plaintiff had attached before maturity, and his position were that of an innocent holder, he would be entitled to \*protection, but [80] under the circumstances the action cannot be maintained. It is clear that the notes could not have been enforced by his assignor, and having taken them with a knowledge of that fact, they are equally unavailable in his hands. What his rights are in respect to contribution it is unnecessary to decide; the action is based upon the notes, and in rejecting them it cannot be sustained. It is possible that the plaintiff may recover upon the notes as against the assignor, but however this may be, the present judgment is erroneous.

Judgment reversed, and cause remanded.

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### DONAHUE v. CROMARTIE-*et al.*

**MECHANIC'S LIEN FOR MACHINERY FURNISHED.**—Where machinery is sold for the purpose of being placed in a building owned by the vendee, with a view of converting it into a manufactory, and is actually used for that purpose, the vendor has a mechanic's lien upon the building for the price.

**IDEM—PAROL EVIDENCE TO EXPLAIN WRITTEN INSTRUMENT.**—Where the sale of materials, employed in the construction or alteration of a building, is made by a written contract, which is silent as to the purpose for which the articles sold were intended to be used, parol evidence is admissible to show such purpose and to establish thereby a mechanic's lien for the price in favor of the vendor.

**MECHANIC'S LIEN—MATERIALS FURNISHED.**—It is not necessary to the establishment of a mechanic's lien that the labor or materials shall be employed in the making or erection of a building. It is sufficient if they are employed in the alteration of a building to adapt it to other than the original uses, or to change its form or structure.

**FINDINGS OF REFEREE—PRESUMPTIONS.**—Where the record on appeal contains a report of a referee by whom the case was tried below, in which is a finding of the facts by him, and no statement on motion for new trial appears in the transcript, it will be presumed that the findings of the referee were based upon sufficient evidence

### APPEAL from the Twelfth Judicial District.

The complaint sets forth a written contract between the

plaintiff and the defendants, by which the former agrees to furnish to the latter a number of pieces of iron machinery specified therein in detail, consisting of a steam engine and boilers, and articles commonly used in connection with them, and also certain iron pans, tanks, pipes, etc., in consideration of which the defendants agree to pay the sum of [81] \$9,050—\$2,000 in hand and the balance in ninety\* days.

The agreement does not state or refer to the uses to which it was intended to put the machinery, or the place where it was to be used. The complaint also contains a *quantum meruit* count for other machinery, alleged to have been sold to defendants a short time subsequently, of the alleged value of \$1,356, avers the delivery and acceptance of all the machinery, and prays a personal judgment for the balance unpaid on both contracts, amounting to \$8,406. It further charges that all the machinery was furnished as materials to be used for the purpose of altering a building in the city of San Francisco, in which the defendants then had an interest, and of converting it into a sugar refinery, and that to this purpose it was applied; and that the plaintiff, by taking the necessary steps required by the statute, had secured a mechanic's lien on said building for the price of the machinery, with a prayer that this lien be foreclosed and the property sold for the satisfaction of the judgment.

The answer admits the execution of the written contract, denies that all the articles contracted for were delivered, and that those which were delivered were of good quality; and denies that the machinery was furnished for the altering of any building, or was put to that use, or that plaintiff has any lien for its price.

On these issues the case was referred to a referee to find the facts and report a judgment.

The referee found the facts substantially as stated in the complaint, and as to the lien that all the machinery "was furnished by plaintiff to the defendants as materials for said building, and to be used in and about the same for the purpose of altering the same and converting it into a sugar refinery, for which purpose said machinery was intended, designed, and used." The report recommended a judgment awarding to the plaintiff relief as prayed for.

On the coming in of this report the plaintiff moved for judgment, and at the same time the defendant moved to set aside the report and for a new trial, both of which motions were submitted together. The decision of the Court was that the report of the referee should be set aside, so far as it related to the lien, and confirmed in other respects, and accordingly a judgment was entered against defendants personally for the amount found due, and denying the enforcement \*of the lien. Plaintiff appeals from so [82] much of the judgment as denies his lien. The transcript on appeal contains the judgment roll, the report of the referee, the motion of plaintiff for judgment; and that of defendants, to set aside the report with the order of the Court thereon, and the notice of appeal, but nothing which purports to be a statement on motion for new trial, nor any portion of the evidence.

*Crockett & Crittenden*, for Appellant.

Parol evidence was admissible to show for what purpose the machinery was sold.

It is true this Court has decided in several cases, that in order to establish a mechanic's lien it is not sufficient to prove that the materials were used in a particular building, but they must, by the agreement of the parties, have been furnished for the particular building on which it is sought to fix the lien. The referee finds that such was the case in this instance, and his report on that point is conclusive, unless it shall be held that parol proof was not admissible to establish the fact.

While we concede the general rule to be, that parol proof is not admissible to add to or vary a written instrument, we think that principle does not apply to this case. The written contract is complete in itself, and we do not seek to contradict or add to it. The undertaking on the part of the plaintiff was to construct for the defendants certain machinery at a stipulated price, and we established by parol that it was understood between the parties that the machinery was to be used in a particular building and for a specified purpose. This is only to ascertain the destination and purpose of the machinery, when made, and does not add to or vary the terms of the contract.

Such proof does not add to or vary the duties of either plaintiff or defendant under the contract, but only exhibits the uses and purposes to which it was understood at the time, between the parties, the machinery was to be applied. If A desires to purchase a gentle horse for harness, and buys one of B for that purpose, explaining fully the uses to which the horse is to be put, and if the contract of sale is reduced to writing, and without any warranty or representation as to the qualities of the horse, if it afterwards turns out that the horse was unfit for harness, and that B knew it, in a suit for the fraud A would not be estopped by the written contract from showing by parol that the horse was purchased for a particular use, which was known to B, and that he misrepresented or fraudulently concealed the fact that the horse was unfit for that use. In other words, it does not vary or add to the written contract to prove the uses to which it was understood, between the parties, the subject-matter of the contract was to be applied. (1 Green. Ev. sec. 288, and note.)

The principle, as we understand it, is that you may prove by parol any mere incident to the contract which does not vary or add to it, but only explains the surrounding circumstances in order to a more perfect understanding of what the parties really intended. In this case the question is, What was in the mind of the parties when the written contract was made? Were the defendants about to convert a particular building into a sugar refinery? Did the plaintiff know it? Was the machinery intended and used for that purpose? Did he contract to make the machinery with a knowledge that it was to be so used? The referee has answered all these questions in the affirmative, and we think no rule of law was violated in admitting parol proof on that point. (See *Miller v. Fitchorn*, 31 Penn. 252-265; *Musselman v. Stover*, Id. 265; *Johnson v. Sherman*, 15 Cal. 291; *Johnson v. McBary*, 5 Jones, Law N. C., 369; *Stanley v. Green*, 12 Cal. 162.)

It is claimed by respondents' counsel, that placing machinery in a building for the purpose of converting it into a sugar refinery, is not within the terms of our statute, which gives a lien for work done or materials furnished for the



“construction or “repairing” of a building, wharf, or “super-structure.”

It will be claimed on the authority of several cases in Pennsylvania, and perhaps other States, that the erection of this machinery in order to convert a building into a refinery, is not the “construction” or “repairing” of a building, or “super-structure,” within the meaning of our act. We have not had access to the statutes under which the Pennsylvania cases were decided, and, therefore, are unable to say how nearly they are analogous to our own, but \*we think it [84] will be found on examination that they are substantially different. But if it be otherwise, we submit that if these decisions are to the effect, that the alteration of a building is neither the “construction or repairing” of a building within the intent and meaning of the act, the decisions are not good law, and should not be followed by this Court. The manifest intention of the law is to secure to mechanics a lien for any work done upon a building, whether it be in the original construction, or in any change or repairs of it. Upon the opposite theory, a mechanic who repairs an old door or window would be entitled to a lien; but one who puts in a new door, or cuts a new window, would have no lien. One who patches an old roof would have his lien, but if he builds a new partition wall he would have none. If he should thoroughly reconstruct an old building, adhering only partially to the original plan, he would have no lien, because it would not properly be either the construction of a new building or the repairing of an old one, but only the alteration of an old building. In giving the lien to mechanics the law contemplated no such subtle distinctions as these, but by the terms “construction” and “repairing,” are meant all work done in erecting, altering, or modifying the building. They are used as generic terms to embrace whatever is done towards fitting up a building for the purposes intended. Statutes must be construed with reference to the evil to be remedied, and the evil to be cured by these statutes was that mechanics who worked upon buildings were frequently defrauded of earnings by their employers, and to remedy this the lien was provided. It is scarcely credible that in providing this remedy the Legislature intended to embrace only those who erected an

entirely new building, or patched up an old one, and to the exclusion of those who changed, modified, or added to an existing building. (See *McGreary v. Osborne*, 9 Cal. 119; *Seldon v. Meeks*, 17 Id. 128.)

There is no statement on motion for new trial, and consequently the findings of fact by the referee are conclusive. If parol evidence was admissible to show the use for which the machinery was designed, it must be presumed that it was introduced and was sufficient to sustain the finding.

[85] \**S. Heydenfeldt*, for Respondents.

I. The contract was simply to furnish certain specific articles of machinery: it was not for materials, or labor, for the construction or repairing of a building or superstructure.

When once the articles were delivered the contract was executed and complete, and the defendants had the right to sell it or destroy it. The case of *Bottomby v. Grace Church*, 2 Cal. 90, is decisive of this case.

In the case of *McGreary v. Osborne*, 9 Cal. 120, the lien was given for work done in repairing machinery already erected and forming a part of the structure as fixtures. There is no analogy between that case and the case at bar.

The case cited from 2 Cal. 90 is sustained by the decisions of other Courts. (See *Hill v. Elliott*, 16 S. & R. 56.)

II. The referee in this case acted simply as a master in chancery. The order referring the cause required him only "to ascertain and report."

The report then, when made, was but an interlocutory stage of the cause: it was not final, or determinate, and to make it so it had to be confirmed by the Court. Accordingly the plaintiff moved for its confirmation, and the defendants to set it aside.

The enforcement of liens belongs exclusively to the jurisdiction of the Court of Chancery, and the Chancellor having the subject before him must decree upon the whole case. (*McHenry v. Moore*, 5 Cal. 92; *Hill v. Saunders*, 8 Id. 287; *Dewey v. Bowman*, Id. 148.) So that it is immaterial what may be the finding of facts of the referee: if they are unsustained by the record, they will be disregarded.

BALDWIN, J. delivered the opinion of the Court—FIELD, C. J. concurring.

The only question in this case is whether the machinery mentioned in the pleadings was intended to be and was used as a part of the building of the sugar refinery. If so, the price stipulated to be paid for it constituted a lien, within the meaning of the statute. It is argued, that parol proof of this intended use or purpose cannot \*be introduced [86] in aid of the written contract for the machinery, which is silent on the subject. But we think that this evidence is not inadmissible. It does not contradict or add any new term to the written contract: it merely shows the purpose to which work stipulated for in the written contract is or was designed to be applied.

We think there is no force in the point, that to constitute a lien the work must be done in the making or erection of a building; but that the alteration of a building to adapt it to other than the original uses, or even to change its form or structure, brings it within the provisions of the statute.

Judgment reversed, and the Court below will enter a judgment on the report of the referee.

On rehearing, NORTON, J. delivered the following opinion—FIELD, C. J. and COPE, J. concurring.

A rehearing was granted in this case upon a petition suggesting that this Court had fallen into an error in its former opinion in supposing that the question as to the right to a lien had been affected by the admission of parol testimony, and did not depend solely upon the terms of the written contract. Upon reëxamining the record, we do not find that any error was committed by this Court in that respect.

In this Court the case is presented on the report of the referee, without any statement on motion for a new trial. The report of the referee consists of two parts—one being in the usual form of a finding of facts and conclusion of law, and the other being called an opinion, and consisting mostly of a discussion of the facts and law of the case and the reasons of the referee for his findings. In the former portion the referee finds as a fact, that "all the machinery mentioned

in said contract 'A,' and in said schedule 'C,' was furnished by plaintiff to the defendants as materials for said building, and to be used in and about the same, for the purpose of altering the same and converting it into a sugar refinery, for which purpose said machinery was intended and designed and used." In the latter part of the report the referee says: "It

[87] may be noticed here that both parties, in the course of the trial, objected to evidence going to interpret the written contract. I admitted parol proof for three reasons—1st, to show by the acts of the parties their construction of the contract; 2d, to meet the counter claim of the defendants; and 3d, to the question of lien." It appears, therefore, that the question of lien was decided by the referee upon the effect of parol evidence going to interpret the written contract. If that portion of the report styled an opinion should not be considered as a part of the report properly so called, and hence not to be regarded, still, if we assume that parol evidence was admissible, we must presume, in the absence of any statement of the proceedings on the trial, that the finding was based upon sufficient evidence. Whether or not such testimony was admissible has not been discussed on this rehearing, and we do not propose to review the former opinion of the Court upon that point.

It is possible that on the motion for a new trial in the Court below the testimony in the case was used in the stead of a formal statement, and that Court may have considered that there was no sufficient parol evidence to sustain the finding as to the lien. But as the case is presented to us without any statement, we must take the finding as conclusive.

We, therefore, adhere to the former ruling of this Court, that the judgment be reversed and the Court below be directed to enter a judgment on the report of the referee.

BURTON v. LIES *et al.*

<sup>1</sup> **COMMUNITY PROPERTY, PRESUMPTIONS AS TO.**—The presumption attending the acquisition of property, during marriage, by either husband or wife, is that the property belongs to the community.

<sup>2</sup> **RECLOSURE, NECESSARY PARTIES TO.**—In an action to foreclose a mortgage all persons beneficially interested in the mortgaged property at the time of the commencement of the action must be made parties.

**IDEM—WIDOW OF DECEASED MORTGAGOR.**—Where the mortgagor of real property sells and conveys his estate to a married man, and after the death of the grantee (his wife surviving) the mortgagee seeks to foreclose, the widow is a necessary party to the action.

**FORECLOSURE—PURPOSE OF ACTION.**—The action for the foreclosure of a mortgage upon real property is not brought for the possession merely of the property, except as such possession may follow the Sheriff's or master's deed, but to subject to sale the title which the mortgagor had at the time of executing [88] the mortgage, and to cut off the rights of parties subsequently becoming interested in the premises; and executors and administrators do not possess the title, but only a temporary right to the possession.

<sup>3</sup> **WRIT OF ASSISTANCE, WHEN TO ISSUE.**—A writ of assistance can only issue against the defendants in the suit, and parties holding under them who are bound by the decree.

**WRIT OF ASSISTANCE, WHEN DENIED.**—L., a married man, purchased certain real estate, subject to a mortgage thereon, which had been previously executed by his grantor, and soon afterwards died. The mortgagee commenced an action to foreclose the mortgage, making the executors of L., but not the widow, a party, and after a decree of foreclosure and sale and expiration of the time of redemption, received the Sheriff's deed, (himself being the purchaser,) and thereupon applied to the Court for a writ of assistance against the widow, who retained possession of a portion of the premises, which on demand she refused to surrender: *Held*, on appeal from an order denying the writ, that the denial was proper; that the estate conveyed to L. became thereby the common property of himself and wife; that upon his death the title to one-half of this property vested in her, subject only to the mortgage and the lien for the payment of debts; that this title was not affected by the proceedings in the foreclosure suit to which she was not a party; and that not being bound by the decree, a writ of assistance could not be issued against her.

**FORECLOSURE SALE—REMEDY OF PURCHASER.**—When the title of a purchaser at a sale in a foreclosure suit fails on account of a defect of parties in such suit, he must seek relief by pursuing the course pointed out in *Boggs v. Hargrave*, 16 Cal. 566.

## APPEAL from the Second Judicial District.

<sup>1</sup> Cited and approved in *Landers v. Bolton*, 26 Cal. 420. See also *Riley v. Pehl*, 23 Cal. 71; *Tustin v. Faught*, 23 Cal. 237; *McDonald v. Badger*, 23 Cal. 393; *Peck v. Vandenberg*, 30 Cal. 56.

<sup>2</sup> Grantees of mortgage must be made parties, affirmed in *Carpentier v. Williamson*, 25 Cal. 161; and see *Lord v. Morris*, 18 Cal. 482; *Fogarty v. Sawyer*, 17 Id. 52; *Skinner v. Buck*, 29 Cal. 253; *Bludworth v. Lake*, 33 Cal. 264; *Same v. Same* Id. 265; *Davenport v. Turpin*, April T. 1872 (not reported); and see also *Dutton v. Warschauer*, post 609; *Croghan v. Spence*, 53 Cal. 16. See 3 Sawy. 212.

<sup>3</sup> See *Montgomery v. Middlemiss*, post 103; *Montgomery v. Byers*, post 107.

<sup>4</sup> *Enos v. Cook*, 65 Cal. 178.

The facts are stated in the opinion.

*Eugene Lies*, for Appellant.

I. Whether Burton acquired a title to the property under decree of foreclosure and sale is not the question at issue. Title cannot be passed upon in summary proceedings. What, we ask, is possession? There are many cases where possession and title are distinct. The error of the Court below in awarding possession to the widow of Lefevre, under a claim of adverse tenancy, is precisely what we appeal from. The Court below was bound to enforce its own decree of foreclosure and sale, with the single exception of persons in possession at the commencement of suit not made parties.

II. Was it sufficient to make the executor of the husband a party to the foreclosure suit?

It is very clear that it was not sufficient for all purposes. The authorities are unanimous on that point. But it was sufficient for the purposes of this application.

[89] \*In *Whitney v. Higgins*, it is settled that all persons interested in the premises prior to the suit brought to foreclose a mortgage, whether purchasers, heirs, devisees, remainder-men, or incumbrancers, must be made parties, otherwise their rights will not be affected.

Nothing is claimed in conflict with the authority of that case. *Whitney* was permitted to redeem. That right, undoubtedly, remains in the heirs of Lefevre, notwithstanding the possession be now awarded to the appellant.

The Court is referred to the reasoning in *Montgomery v. Tutt*, 11 Cal. 314. The distinction there so clearly made between proper parties and necessary parties, applies well to this case. "The purchaser under the decree takes a title only as against the parties to the suit." All the authorities agree that parties not brought into a suit of foreclosure preserve certain rights, but the point where they differ is, as to what those rights are. In New York the decree of foreclosure seems to be treated as a perfect nullity for want of necessary parties, while in Ohio, Alabama, and Kentucky, it is merely held that the rights of redemptioners, not made defendants, are not affected. (Hilliard on Mort. ch. 33.)

The latter view is maintained in the above decisions of this Court.

What is, after all, the chief rule that governs as to parties to any litigation but a certain, present, actual interest (often artificial and the creature of law) in the subject matter.

In England the executor brings assumpsit, but the heir, ejectment. Why this distinction? It is not a question of title, since the heir, in many cases, is entitled to the personal as well as the real estate. The true reason is, that the executor is entitled, during administration, to the control, management, and disposal of the personalty; and that, for the time being, the legal title is in him alone, by virtue of his office.

In this State the executor or administrator is the proper party to bring ejectment. (*Curtis v. Sutter*, 15 Cal. 264.) If, then, an executor can bring ejectment, why cannot he suffer a decree of foreclosure on a lot belonging to his testator? Why should the heir be joined? Is it to secure the heir's right of redemption? Clearly not, since that right is secured to him by statute. (Pr. Act, 230.) The heir should be joined, however, by any prudent \*mortgagee who [90] wishes to limit his right of redemption to the statutory period.

The position asserted, then, is, that the Sheriff's deed, under the circumstances of this case, vested in Burton the title of which Lefevre died seized, subject to rights of redemption in the parties not made defendants. Or, failing in this, that it vested in Burton the right of immediate possession.

III. The wife is not and cannot be in possession by any right of her own. The party in possession (whoever now occupies the premises) is the executor (*Curtis v. Sutter*, 15 Cal. 264;) and this, whether or not the premises be common property. For, "upon the death of a married man, the whole of the common property is assets of the deceased, to be administered on by his personal representatives." (12 Cal. 599.)

FIELD, C. J. delivered the opinion of the Court—COPE, J. and NORTON, J. concurring.

The plaintiff sold to the defendant Lies certain real estate.

and took from him a mortgage to secure the payment of \$4,000 of the purchase money. Lies sold the property to one Lefevre, subject to the mortgage, and subsequently received back a conveyance of a portion of the premises. Lefevre died soon afterwards, and the defendant De la Guerra is the executor of his estate. The plaintiff brought his action for the foreclosure of the mortgage, making Lies and the executor parties defendant, obtained the usual decree for the sale of the premises, became the purchaser at the sale, and, no redemption having been made within six months afterwards, received the Sheriff's deed. With this deed he demanded possession of a part of the property sold from the widow of Lefevre, who was at the time in its occupation, and the possession having been refused by her, he applied to the Court for a writ of assistance. The application was resisted by the widow, who alleged that she occupied the premises by virtue of a lease from one Thompson, and that he owned an undivided half of the same, by purchase from certain parties made in 1837. The Court denied the writ; and hence the present appeal.

It would seem that the premises in the possession of [91] the widow \*constituted the common property of Lefevre and herself. They were purchased by him during the existence of the community, and the presumption attending the acquisition by purchase of property, during that period, by either husband or wife, is that it belongs to the community. (*Meyer v. Kinzer*, 12 Cal. 251.) Upon the death of Lefevre, one undivided half therefore passed absolutely to her, subject to the lien of the mortgage, and to the payment, with other property, of his debts. (*Payne v. Payne*, 18 Cal. 291.) She should, in consequence, have been made a party defendant in the action for the foreclosure of the mortgage. The general rule is, that all persons beneficially interested in the mortgaged property at the commencement of the action must be made parties, in order that complete justice may be done, and that a clear title may pass under the decree. The purchaser takes a title only as against the parties to the action; and hence, for obvious reasons, persons claiming as the survivors, devisees, or heirs of the mortgagor, or as subsequent purchasers or incumbrancers, at the time the suit is



instituted, should be brought in. (*Montgomery v. Tutt*, 11 Cal. 314.)

Executors and administrators, it is true, under our system, take possession of all property, real and personal, of the deceased whose estates they represent, and have the right to the possession of the same until the estates are settled or distribution is directed by the Probate Court; and, in consequence, have until then the sole right to maintain actions of ejectment for real property of the decedents withheld from them. (*Meeks v. Hahn*, 20 Cal. 620.) But the action for the foreclosure of a mortgage is not brought for the possession merely of the property, except as such possession may follow the Sheriff's or Master's deed, but is brought to subject to the title of the mortgagor—that is, such title as he had at the date of his mortgage—and to cut off all the rights of parties subsequently becoming interested therein. Executors and administrators do not possess the title, but only a temporary right to the possession of the property.

The decree did not, therefore, bind or in any respect affect the rights of the widow Lefevre to her undivided half of the mortgaged premises. Her estate in that half remains as it existed previous to the institution of the foreclosure suit. (*Goodenow v. Ewer*, 16 \*Cal. 461; *Boggs v. Hargrave*, Id. 562.) And the Court very properly denied the application for the writ of assistance against her. Such writ can only issue against the defendants in the suit, and parties holding under them, who are bound by the decree.

We have considered the widow of Lefevre as succeeding to one undivided half of the property, and in doing so we have not overlooked the fact that she resisted the application for the writ as tenant under Thompson—a party holding adversely to the mortgagor by title existing previous to the execution of the mortgage. If Thompson did hold an adverse title as represented, the fact was of itself a sufficient justification for the Court to refuse the writ, and to leave the purchaser to his action of ejectment. We have, however, treated the widow as having, in her own right, one undivided half of the property, upon facts admitted by the appellant in his brief.

The decree is valid as to the premises owned exclusively by

the defendant Lies, and by the sale the purchaser acquired his title. If the purchaser desires to apply for relief from the sale, and to take further proceedings by a supplemental bill, bringing in the widow and other parties, for a resale of the premises, he must pursue the course pointed out in *Boggs v. Hargrave*, 16 Cal. 566.

Order affirmed.

### HIDDEN v. JORDAN.\*

<sup>1</sup> **TRUST.**—Where a conveyance of land is executed to one person and the purchase money is paid by another, the grantee holds the land in trust for the person who pays the consideration.

**RESULTING TRUST.**—Where a part of the purchase money of land is paid by a person other than the grantee, and no agreement is shown between the grantee and such person, a trust results in favor of the latter for an interest in the land proportioned to his share of the purchase money.

**RESULTING TRUST—PROOF OF VERBAL AGREEMENT.**—Although a verbal agreement by A to purchase land for B may not be given in evidence to establish a resulting trust where the entire purchase money has been paid by A and the conveyance taken in his name, yet if any part of the purchase money is shown to have been paid by B, a verbal agreement may then be proved which shall have the effect to deprive A of all beneficial interest in the purchase, and to clothe the entire estate in his hands with a trust in favor of B.

[93] **PURCHASE BY AGENT.**—\*Whether, where an agent employed by his principal to purchase lands pays the entire purchase money and takes a conveyance to himself, this is not such a breach of good faith as to warrant the reception of parol evidence to establish a trust in favor of the principal—*Query?*

<sup>2</sup> **STATUTE OF FRAUDS—PAROL EVIDENCE.**—The Statute of Frauds will never in equity be allowed to operate as a protection to fraud, and for the purpose of showing that a fraud has been committed, or is being attempted, parol evidence will be admitted, even against the words of the statute.

**RESULTING TRUST—PROOF OF VERBAL AGREEMENT.**—H., being desirous of purchasing a certain farm, agreed verbally with J. that the purchase should be made by and in the name of J., and the conveyance taken to him; that H. should furnish a portion of the purchase money, and that the balance should be advanced by J. and within a certain time repaid to him with interest by H., upon which J. should convey the title to H. H. having furnished the portion of the purchase money

\*This case was up on a second appeal, see 28 Cal. 301; and still later on in third appeal, see 32 Cal. 397.

<sup>1</sup> Trust how created, affirmed in *Bayles v. Baxter*, 22 Cal. 580; cited as authority in *Simson v. Eckstein*, 22 Cal. 593; *Sandfoss v. Jones*, 35 Cal. 488; *Case v. Coddington*, 38 Cal. 193. See also *Millard v. Hathaway*, 27 Cal. 119; *Cnrrey v. Allen*, 34 Cal. 254; *Price v. Reeves*, 38 Cal. 457; *Roberts v. Ware*, 40 Cal. 637; *Walton v. Karnes*, 67 Cal. 257.

<sup>2</sup> Affirmed in *Bayles v. Baxter*, 22 Cal. 530; *Sandfoss v. Jones*, 35 Cal. 499; and see *Settembre v. Putnam*, 30 Cal. 490; *Hidden v. Davisson*, 51 Cal. 140.

as agreed, J. made the purchase, paid the whole price and took a deed in his own name. In an action by H. to compel J. to execute a conveyance to him: *Held*, that the verbal agreement might be proved for the purpose of showing a resulting trust in favor of H., and that the effect of the transaction was to make J. a mere trustee of H. as to the entire property, holding the legal title as security for the repayment of his advances.

#### APPEAL from the Seventh Judicial District.

In November, 1857, the plaintiff was in possession of a tract of land in Solano County, and had upon it a dwelling-house, fences, and improvements of the value of about \$2,000. For some time previous the title to the land had been in controversy between the plaintiff on the one side and one Bissell and the representatives of one Ritchie, deceased, on the other, and a litigation which had been pending was about that time settled by plaintiff admitting the title of Bissell and others and agreeing to purchase from them.

November 12th, 1857, Bissell and the administrators of Ritchie executed to the defendant, Jordan, a deed of the premises in consideration of \$6,000 paid in cash and \$1,780 in a note of Jordan payable in August, 1858, with interest at one per cent. per month and secured by a mortgage on the land. The plaintiff continued to occupy and cultivate the farm after the execution of the deed to defendant and until the autumn of 1858.

The complaint in this action was filed in November, 1858, and sets up substantially the foregoing facts, and alleges that the defendant in making the purchase and taking the deed from Bissell and others was acting as the agent and on behalf of the plaintiff; that \*\$2,000 of the cash pay- [94] ment made was money actually advanced by the plaintiff at the time, and that the other \$4,000 was advanced by defendant with the understanding and agreement that within two years plaintiff should repay it to defendant with interest at an agreed rate, and within the same period should pay the amount of the note executed by Jordan to Bissell and others with interest; that the deed was made to Jordan for the purpose of securing him for the advances which he was making, and that upon the repayment of those advances defendant was to deed the land to plaintiff; that the note made by Jordan had since been paid from the proceeds of the crops of

the land, which had been delivered to defendant by plaintiff for that purpose; that the interest of the \$4,000 advanced had been settled from time to time by the giving of plaintiff's notes for its amount to defendant, in accordance with their verbal agreement. The complaint further averred, that the defendant had in various ways, by words and by acts, (many of which were set forth in detail in the pleading,) admitted the character of the transaction to be as now averred, but that shortly before the bringing of the action he had repudiated their verbal agreement, and claimed that by virtue of his deed he was the owner of the land in his own right. The complaint concluded with a prayer that the defendant be decreed to execute a conveyance of the premises to the plaintiff.

Before an answer was made by defendant, plaintiff filed a supplemental complaint, averring that since the commencement of the action he had tendered to the defendant the full amount due to him on account of money advanced to purchase the land with interest as agreed upon, which defendant had refused to receive; that he, plaintiff, was still ready to make said payment, and prayed that an account might be taken of what was due, and he be allowed to pay it into Court for defendant upon his executing the deed as prayed for in the original complaint.

The answer is to both the original and supplemental complaint, and consists of a denial in detail (though in a somewhat evasive form) of all the allegations of the complaint tending to show any interest on the part of the plaintiff in the purchase of the land, and avers, substantially, that [95] the purchase was made with the money of \*defendant, and for his sole use and benefit. It also denies the tender of any money by plaintiff as alleged in the supplemental complaint.

The evidence was taken and reported to the Court by a referee appointed for that purpose. No written agreement was shown to have been made between the parties relating to the interest of plaintiff in the purchase from defendant's grantors. The evidence upon this point on the part of plaintiff consisted in proof of various acts of the parties and verbal declarations by defendant at the time of and subsequent to

the purchase. The evidence in this respect was such as to sustain fully the plaintiff's theory of the transaction.

By a subsequent order of the Court, made May 21st, 1861, the referee was required to find as a fact what portion of the purchase money had been paid by plaintiff and what by defendant, and his report on this point showed that defendant had paid \$4,000 at the time of purchase and the principal and interest on his note to Bissell and others, \$1,960, in all \$5,960; that plaintiff paid at the time of purchase \$2,000, and had subsequently given to defendant at different times as the interest on the \$4,000 account his notes for the same amounting in the aggregate to seven hundred and forty-seven dollars and fifty cents, on which notes plaintiff had paid seventy-five dollars; and that the defendant had received the entire rents and profits of the land during the years of 1858, 1859, and 1860.

The judgment of the Court was, that defendant deed to plaintiff an undivided one-third of the property and account to him for one-third of the rents and profits from the date of the purchase to the rendition of the decree, less one-third of the amount of the note made by Jordan to his grantors and paid by him; that all the notes between the parties be given up and canceled; and that defendant repay to plaintiff the seventy-five dollars which he had received from him on the interest notes.

Both parties moved for a new trial, which was denied. The appeal is taken by plaintiff from the judgment and from the order refusing a new trial.

*A. M. Wheaton*, for Appellant.

\*Defendant in receiving the deed acted as the agent [96] of plaintiff and held the whole property in trust for him. This trust arose from operation of law and could be shown by parol. (*Osborne v. Endicott*, 6 Cal. 149; 1 Greenl. on Ev. sec. 246; 4 Kent's Com. 306, 143; *Pierce v. Robinson, Administrator*, 13 Cal. 116.)

A mortgagee who is also a trustee is bound to execute his trust as faithfully as though he were not a creditor. (*Gunter v. Jeans*, 9 Cal. 643.)

A deed absolute upon its face may be shown to be a mortgage. (*Lee v. Evans*, 8 Cal. 424; *Pierce v. Robinson*, 13 Id. 116.)

Specific performance of a verbal contract will be decreed in case of part performance. (*Arguello v. Edinger et al.*, 10 Cal. 150; Wood's Dig. art. 398.)

*J. W. Winans*, for Respondent.

I. Respondent, Jordan, was the actual owner of the land and did not hold it in trust for Hidden. Appellant urges that a deed absolute upon its face may be shown by parol to be a mortgage. This proposition we do not dispute. But there is no evidence whatever to show that the deed from Bissell and others to Jordan was designed to be a mortgage. On the contrary, the proof is express the other way. The rule applies to cases where the deed absolute is given as a mortgage by the grantor so as to leave the equity of redemption in him. Here it is claimed that the grantor gave the deed to Jordan to operate as a mortgage from Hidden to Jordan. This was not the fact. Nor if it were could it be within the limits of parol evidence to establish it.

Section sixth of the Act of April 19th, 1850, entitled "An Act concerning Fraudulent Conveyances and Contracts," provides, that "No estate or interest in lands other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same."

Here there was no deed or conveyance subscribed [97] by the parties \*or either of them; nor was there, even if the parol testimony be admissible, nor could there be any trust created by act or operation of law, whatever may have been the promises of Jordan, except such implied trust in reference to the proportion of purchase money advanced by Hidden as might render him a *cestui que trust* of Jordan to such quantity of the land as was purchased therewith. And this is what was held by the Court below. "A trust," says the Court, "resulted to him (Hidden) to the extent of the purchase money by him advanced."

Beyond the extent to which Hidden was interested in the purchase of the property, by reason of his advancement of a

portion of the purchase money, any further promise by Jordan to hold the remainder, or buy the remainder, in trust for Hidden was a *nudum pactum*, without any consideration and absolutely void if ever made.

Suppose A makes a verbal promise to B that he will with his own funds purchase an estate and hold it in trust for B, to be conveyed to him when he pays A the amount of the purchase money, could such a promise be enforced? And if B furnishes a portion of the purchase money would this make any difference in the principle, except as relates to the portion of the land bought therewith?

II. If Jordan did hold all the land in trust for Hidden, still such trust was purely conditional, viz.: that Hidden should pay his debt to Jordan on the twenty-sixth day of October, 1859, whereupon, Jordan could make him a deed of the land. Hidden never complied with this condition, and thus the estate became absolute in Jordan.

CORP, J. delivered the opinion of the Court—FIELD, C. J. and NORTON, J. concurring.

This is an action to compel the defendant to convey to the plaintiff a tract of land in the county of Solano. As we understand the case, the plaintiff employed the defendant to purchase the land for him, advancing a portion of the purchase money, and agreeing with the defendant as to the payment of the balance. The defendant paid upon the purchase, in addition to the amount advanced by the plaintiff, the sum of \$4,000, and executed his notes for the further sum of \$1,780, taking the deed in his own name. The pleadings are voluminous and somewhat complicated; but [98] the facts, as alleged and proved, show that the money paid by the defendant was intended as a loan, and that he took the deed merely as security. His position is analogous to that of a mortgagee with a conveyance absolute on its face, and he has no higher or other rights than those of a creditor having a lien upon the property of his debtor. The evidence establishes conclusively the relation of debtor and creditor between the parties, and this relation created at the inception of the transaction determines its character forever afterwards. The proof consists entirely of verbal testimony, but the facts

are clearly made out, and it would be grossly inequitable to deprive the plaintiff of the fruits of the purchase. The Court below held that he was entitled to an undivided interest in proportion to the amount of money which he had paid, and decreed a resulting trust in his favor to that extent. We think he is entitled to the whole land, and the conclusion arrived at by the learned Judge who decided the case, seems to have been based upon the pleadings, and not upon the merits of the controversy. The complaint was filed in November, 1858, and the summons issued on the thirteenth of January, 1859, and on the seventeenth of the same month a supplemental complaint was filed setting up certain matters occurring subsequently to the filing of the original. It is alleged in the supplemental complaint that on the third of January, 1859, the plaintiff tendered to the defendant the amount due him for money paid upon the purchase, and that he refused to receive the same, etc. The defendant answered to both complaints, but the Court, deeming the supplemental complaint to have been improperly filed, refused to consider it, and disregarded the evidence adduced in support of it. The objection was not taken by the defendant, but the case throughout, so far as the parties are concerned, was conducted upon the understanding that the supplemental complaint constituted a part of the pleadings. Under these circumstances, we think the Court had no right to reject it, or disregard the evidence, but should have treated it as the parties had treated it, as properly in the case. As the matters involved in this branch of the controversy were not passed upon, they are not now before us for consideration, and the most that we can say is that they ought not to have been excluded.

[99] \*The counsel for the defendant relies upon the Statute of Frauds, and contends that in the absence of a written agreement or memorandum, the facts stated are insufficient to charge the defendant as a trustee. Admitting, however, that there is a resulting trust, as decreed by the Court below, he claims that an agreement resting in parol merely cannot be given in evidence to establish a trust as to the balance of the land. It is clear that to the extent of the purchase money paid by the plaintiff, the case falls within the doctrine of resulting trusts, and trusts arising by implication



of law are expressly excluded from the operation of the statute. "Where," says Story, "a man buys land in the name of another, and pays the consideration money, the land will generally be held by the grantee in trust for the person who so pays the consideration. This, as an established doctrine, is now not open to controversy. The clear result of all the cases, without a single exception, is that the trust of the legal estate, whether freehold, copyhold, or leasehold—whether taken in the names of the purchaser and others jointly, or in the name of others, without the purchaser, results to the man who advances the purchase money. This is a general proposition, supported by all the cases, and there is nothing to contradict it." (2 Story's Eq. sec. 1,201.) It seems formerly to have been doubted whether a resulting trust could be sustained, where only a part of the consideration was paid by the person seeking to enforce the trust. In *Crop v. Norton*, 9 Mod. 233, Lord Hardwicke held that it could not; but this is the only authority we have been able to find to that effect, and there are several English as well as American cases to the contrary. The English cases are referred to by Mr. Chancellor Kent, in *Botsford v. Burr*, 2 Johns. Ch. 404, and he comes to the conclusion that payment of part of the consideration carries with it a proportional interest in the land. This we understand now to be the settled rule, and it appears to us to be the logical and necessary result of the principle upon which trusts of this character are maintained. The second point suggested is one of more difficulty, but we think that as the plaintiff advanced a portion of the purchase money, the whole transaction is open to inquiry. He parted with his money upon the faith of his engagement with the defendant, the latter receiving it, agreeing to act as his agent\*and purchase the land for him. The statute '[100]' was intended to prevent frauds, and not to encourage and sustain them, and in matters of trust and confidence, where there has been a violation of good faith, no protection is afforded by it. In *Bartlett v. Pickersgill*, 2 Eden, 515, it was held, that a verbal agreement by the defendant to purchase an estate for the plaintiff could not be given in evidence to establish a resulting trust. But Lord Keeper Henley, in the opinion delivered, said: "If the plaintiff had paid any part

of the purchase money, it would have been a reason for me to admit the evidence." This is precisely the case at bar, and the principle at the bottom is, that the party having paid his money in consideration of the agreement, it would be a fraud in the agent to refuse to carry it out. The fact of the agency is a material circumstance, and in *Lees v. Nuttall*, 1 Russ. & M. 53, that fact alone was regarded as sufficient, no money having been paid, and nothing appearing but the agency and the purchase. This decision goes further than it is necessary to go in the present case—further, perhaps, than the general current of authorities upon the subject—and is not easily reconciled with the decision in *Bartlett v. Pickersgill*. It may be said in reference to the decision, however, that the agent had not been employed to obtain a conveyance, but to make a contract for the purchase, the conveyance to be made to the principal. In becoming himself the purchaser, he had violated the confidence reposed in him and committed a fraudulent breach of trust, to the prejudice of his employer, inflicting a wrong which the Court considered itself called upon to redress. Undoubtedly the ground taken was that of fraud, and in view of the particular circumstances of the case, it would be going a great way to affirm with certainty that the decision was wrong in principle. The same rule was applied in *Taylor v. Salmon*, 4 M. & C. 134, where an agent who had been employed to procure a lease of certain mines had taken the lease in his own name. The Lord Chancellor, in deciding the case, said: "If Salmon, at the time when he entered into the agreement with Lord Dunmole, was acting as the agent of the plaintiff, Taylor, in negotiating for the lease, it is not material whether at that moment he intended that the agreement should be for the benefit of the [101] plaintiff, or for his own; because in either \*case the plaintiff would be entitled, as against him, to the benefit of the contract." Judge Story, in *Jenkins v. Eldridge*, 3 Story C. C. 181, says, that "the rule in equity always has been, that the statute is not to be allowed as a protection to fraud, or as a means of seducing the unwary into false confidence, whereby their intentions are thwarted, or their interests betrayed." He cites the case of *Montacute v. Maxwell*, 1 P. Will. 618, where it was said that "in cases of fraud,

equity would relieve even against the words of the statute; but where there is no fraud, only relying upon the honor, word, or promise of the defendant, the statute making those promises void, equity will not interfere." In respect to that case, he says: "The case itself seems originally to have stood upon a peculiar ground, that marriage is not a part performance to take the case out of the statute, contrary to the common rule in other cases within the statute; and has been so understood by subsequent Judges. In its general language, the case affirms the doctrine that fraud takes the case out of the statute, even in cases of agreements in consideration of marriage. The other language, that it is otherwise where there is no fraud, but reliance is placed solely upon the honor, word, or promise of the party, must be limited to cases of marriage, and certainly is inapplicable to cases where there has been a part performance or execution of the agreement on the other side." This, however, resolves itself into a matter of fraud, for the distinct ground upon which Courts of Equity interfere in cases of part performance is, that without such interference one party would be enabled to practice a fraud upon the other. The same learned Judge so declares in his work on equity jurisprudence, and adds that "it could never be the intention of the statute to enable a party to commit such a fraud with impunity." (2 Story's Eq. sec. 759.) The rule that fraud takes the case out of the statute is too well settled to admit of doubt, and for the purpose of showing that a fraud has been committed, or is being attempted, parol evidence has always been held to be admissible. The difficulty has been in determining what amounted to fraud in the particular case, and to this difficulty is referable those conflicts of opinion which seem occasionally to have trenched upon the rule itself. The rule, however, is universally acknowledged, and there is no case in which the conduct of the defendant was held to be [102] fraudulent that he has been allowed to shelter himself behind the statute. The cases themselves are too numerous for us to attempt even a partial examination of them, nor is it necessary for the purposes of this case that we should do so, for the principle is recognized by all. The defendant is acting in violation of his agreement, and the fact that this

agreement related to a matter of trust and confidence, coupled with the fact of the payment of money by the plaintiff, is undoubtedly sufficient to avoid the statute. What the defendant undertook to do was to purchase the land; not a part of it, but the whole; not for himself, but for the plaintiff; and what he is attempting to do is to deprive the plaintiff of the benefit of the purchase. This, according to the decision in *Bartlett v. Pickersgill*, he might succeed in doing, if the whole of the purchase money had been paid by himself; but as the plaintiff paid a portion of it, he is entitled to have the agreement enforced. The money was paid with the understanding that he was to have the entire estate, and the defendant agreed that he should have it, and became his agent for the purchase, received the money and bought the land. The plaintiff cannot be required to take less than the whole, for that was his bargain; and to allow the defendant to force him into the position of a joint purchaser, would be to sanction and legalize a fraud. It is true, the rejection of the agreement would not compel him to take a part of the land, for he could sue and recover the money; but there is nothing in this to relieve the conduct of the defendant from the imputation of fraud. He received the money in trust, agreeing to invest it for the benefit of the plaintiff, and having made the investment, to refuse for his own advantage to carry out the trust, is a fraud of the grossest character. We are unable in any view of the case, to regard the matter otherwise than a fraud; and our conclusion is, that the judgment of the Court below should be reversed, and the cause remanded for a new trial.

Ordered accordingly.

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[103] \*MONTGOMERY v. MIDDLEMISS.

<sup>1</sup> DECREE IN FORECLOSURE CONCLUSIVE.—The decree in an action to foreclose a mortgage concludes the rights of all parties to the action, and the sale under it, consummated by the Sheriff's deed, passes, as against them, the entire estate held

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<sup>1</sup> Cited as authority in *Grattan v. Wiggins*, 23 Cal. 35; see *Shores v. Scott Etc. Co.*, post 135; *Hayes v. Shattuck*, ante 52.

by the mortgagor at the date of the mortgage. The purchaser as against such parties is entitled upon the receipt of his deed to the possession of the premises, and, if necessary, to the aid of the Court in enforcing its delivery—and his right to this aid is not affected by the fact that pending the action the plaintiff may have executed to one of the parties defendant a conveyance of the whole or a portion of the premises embraced in the decree.

\* **WRIT OF ASSISTANCE, WHEN GRANTED.**—The purchaser at a sale under a decree of foreclosure of a mortgage is entitled to a writ of assistance, although the decree in the foreclosure action contains no direction to deliver the possession, and although at the time of the application no preliminary order for such delivery of possession has been made by the Court.

\* **WRIT OF ASSISTANCE, WHAT REQUISITE TO OBTAIN.**—All that is requisite to obtain the writ as against the parties, and those claiming with notice under them after the commencement of the action, is to furnish to the Court proper evidence of a presentation of the deed to them, and a demand of the possession, and their refusal to surrender it.

### APPEAL from the Fifteenth Judicial District.

On the twenty-seventh day of October, 1858, the plaintiff, A. Montgomery, commenced an action to foreclose a mortgage executed to him by one Geo. Wilson in 1855, upon certain land in Colusa County, and to this action said Wilson and the respondent, James Middlemiss, and others, alleged to have or claim some interest in the premises, were made parties defendants, and duly served with process. Pending this suit, and on the nineteenth day of December, 1859, the plaintiff executed to the defendant, Middlemiss, a quitclaim deed for that portion of the mortgaged premises of which possession is sought by this proceeding.

On the ninth day of May, 1861, a decree was rendered in the foreclosure suit against all the defendants therein in the usual form, directing a sale of the mortgaged premises, including the portion conveyed to Middlemiss, and in pursuance of the decree, a sale was had at which plaintiff became the purchaser, and at the expiration of six months, no redemption having been made, he received the Sheriff's deed.

The decree did not, in terms, order a delivery of the possession\* to the purchaser. Plaintiff exhibited his [104] Sheriff's deed to Middlemiss, who was occupying that portion of the premises covered by his deed, and demanded from him the possession, which was refused. And thereupon,

\* Affirmed in *Montgomery v. Byers*, post 107; *Burton v. Lies*, ante 87; also *Skinner v. Beatty*, 16 Cal. 158; *Frisbie v. Fogarty*, 34 Cal. 11; *Tewis v. Hicks*, 38 Cal. 234; *Langley v. Voll*, 54 Cal. 437.

without obtaining any preliminary order, plaintiff applied to the Court for a writ of assistance. The application was resisted by Middlemiss, and after a hearing, was denied by the Court, and from the order denying the application, the present appeal is taken by plaintiff.

*Geo. Cadwalader*, for Appellant.

The case involves this proposition:

A commences a suit to foreclose a mortgage, and to that suit B is a party defendant. Prior to the decree in such suit, A quitclaims to B a part of the mortgaged premises, and then goes on and enters up a final decree for the sale of the whole of the mortgaged premises, under which a sale is had and thereat A becomes the purchaser, and the statutory time elapsing without a redemption, obtains a Sheriff's deed for the mortgaged premises, embracing the part previously quitclaimed to B. Thereupon, after notice and the exhibition of his Sheriff's deed to B in possession of the land quitclaimed to him, A asks to have his decree executed against him through the form of a writ of assistance.

Is A entitled thereto or not, is the question.

It was assumed on the argument that this proceeding on the part of A involved a kind of moral obliquity, which, while it did not alter his title or give his land to somebody else, would deny to him that prompt and efficacious relief which Courts of Equity for a century have extended to purchasers at mortgage sales.

The extent of A's offending, concentrated, is that he quitclaimed his right, title, and interest, to a tract of land to which he possessed neither "right, title, nor interest."

Now, it has never been contended that such a deed was an affirmance on the part of a vendor of any particular estate or interest or ownership in the land, that bound him in the event of any deficiency in the land described to make it good; but, on the contrary, its operation is as a mere release from the

vendor to the vendee of the existing interest of the  
[105] former. Neither in honor, nor \*morals, nor law, is he compelled to convey to his vendee any estate that he might thereafter acquire in the premises described in his deed.

Thus, in *San Francisco v. Lawton*, 18 Cal. 475, Chief Justice Field said:

"A quitclaim deed only purports to release and quitclaim whatever interest the grantor possesses at the time. He does not thereby affirm the possession of any title, and he is not precluded from subsequently acquiring a valid title and attempting to enforce it. If he does not possess any title, none passes, and he may subsequently deny that any passed, without subjecting himself to any imputation of a want of good faith."

In this case, Montgomery acquired a valid title to the premises in controversy, after the execution of his quitclaim deed to Middlemiss, which he is now trying to enforce, and he is not estopped from so doing by his quitclaim deed. (*Clark v. Baker*, 14 Cal. 612; 2 Washburn Real Property, 466.)

The decree of the ninth of May, 1861, was a finality as to all parties, either plaintiff or defendant thereto, for it was the sentence of a Court of competent jurisdiction. Whatever rights the parties had to the mortgaged premises were merged in said decree—in it all anterior rights and stipulations were merged, or rather, defined and fixed, upon principles that govern Courts of Equity—defenses, rights, privileges, and agreements, not declared in the decree or reserved therein, are forever gone. A sale under the decree ripening into a Sheriff's deed passes an estate that cannot be questioned by any party to the suit and decree, plaintiff or defendant.

This is a rule of law as well as of equity, and is founded upon the amplest reason. Any other rule would make the decree of a Court of Equity the "merest mockery," and nothing could or would ever be settled, if a party to a decree, against whom its execution was about to be enforced, could plead there an agreement with his attorney, that the decree should not affect his property, or be enforced against him; or that he had a certain right to part of the premises in litigation that was untouched by said decree, and unaffected thereby. Or, on the other hand, if a plaintiff, reaping the benefit of a sale to a third party, under a decree of a Court of \*Equity in his favor, could then turn around [106] and say, that such decree did not award to him the proper measure of justice, and upon proof of such fact,

overturn it, the same endless litigation and confusion would result, and Courts of Law as well as Courts of Equity would be constantly employed in revising decrees of the latter Court, though made final by statute after the expiration of the time allowed by law for appeal. (*Reynolds v. Harris*, 14 Cal. 678; *Montgomery v. Tutt*, 11 Id. 191; *Skinner v. Beatty*, 16 Id. 157; *Horn v. Volcano Water Co.*, 18 Id. 141.)

*Belcher & Belcher*, for Respondent.

I. There was no order to deliver possession either in the decree or made by the Court. (*Montgomery v. Tutt*, 11 Cal. 193.)

II. A mortgagee has an equitable interest in the land mortgaged, which a quitclaim deed from him will pass, either by assigning the mortgage or releasing the land from its operation. (*Farmers' Loan & Trust Co. v. McKinney*, 6 McLean, 1; *Lampsey v. Nudd*, 9 Foster, 299; *Niles v. Ransford*, 1 Mann., Mich., 338.)

FIELD, C. J. delivered the opinion of the Court—NORTON, J. concurring.

It is impossible to perceive, from the facts disclosed by the transcript before us, what effect, if any, the quitclaim deed of the mortgagee had upon the rights of Middlemiss. It was executed during the pendency of the action for the foreclosure of the mortgage, and if available for any purpose it should have been in some form presented to the consideration of the Court before the decree for the sale of the entire premises was entered. The decree concluded the rights of the parties to the action, and the sale under it, consummated by the Sheriff's deed, passed, as against them, the entire estate held by the mortgagor at the date of the mortgage. As against them, the purchaser was entitled, upon the receipt of his deed, to the possession of the premises, and if necessary, to the aid of the Court in enforcing its delivery.

It is urged by the respondent, in support of the order refusing the writ of assistance, that the decree did not contain any direction to deliver the possession to the purchaser, and that no preliminary \*order for such delivery was made by the Court; and as sustaining the



objection, the case of *Montgomery v. Tutt*, 11 Cal. 193, is cited. In that case we referred to the steps required under the old chancery practice to obtain the writ, and observed that "in our system, the order to deliver possession should be first made, unless a direction to that effect is contained in the decree, and if upon its service that is disregarded, the Court can at once direct the writ to issue. If delivery of possession to the purchaser is directed by the decree, no preliminary order will be requisite; but upon proof of disobedience to the decree, the party will be entitled, as a matter of course, to the writ as against the defendants in the suit." Upon further consideration of the subject in later cases, we have come to the conclusion that the preliminary order may be omitted even where no direction for the delivery of possession is contained in the decree. The legal effect of the decree is the same without the direction. (*Horn v. Volcano Water Company*, 18 Cal. 107.) All that is requisite to obtain the writ, as against the parties and those claiming with notice under them after the commencement of the action, is to furnish to the Court proper evidence of a presentation of the deed to them, and a demand of the possession, and their refusal to surrender it.

It follows that the order of the District Court refusing the writ must be reversed, and that Court directed to issue the writ pursuant to the petition of the plaintiff; and it is so ordered.

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### MONTGOMERY v. BYERS *et al.*

**PURCHASER PENDING FORECLOSURE.**—A person who, pending an action for the foreclosure of a mortgage and with notice of its pendency, purchases from one of the defendants therein a portion of the mortgaged premises, occupies the same position as his grantor in reference to the issuance of a writ of assistance in favor of the purchaser under the decree.

<sup>1</sup> **WRIT OF ASSISTANCE.**—The doctrine of *Montgomery v. Middlemies*, ante p. 108, in reference to the issuance of writs of assistance, affirmed and followed.

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<sup>1</sup> See *Burton v. Lies*, ante 87.

## APPEAL from the Fifteenth Judicial District.

[108] \*Application for a writ of assistance by the same party and in the same action as in the preceding case of *Montgomery v. Middlemiss*. Pending the foreclosure action the plaintiff therein conveyed to one of the defendants, Margaret L. C. Wilson, his interest in a portion of the mortgaged premises, and the respondents purchased from her with notice of the pendency of the action before the entry of the decree of foreclosure, and being in possession of the portion thus purchased resisted the application of the plaintiff for a writ of assistance. The application was denied by the District Court, and the plaintiff appeals.

*Geo. Cadwalader*, for Appellant.

*Belcher & Belcher*, for Respondents.

FIELD, C. J. delivered the opinion of the Court—NORTON, J. concurring.

The respondents purchased of one of the defendants after the commencement of the action, and with notice of its pendency. They occupy, therefore, the precise position of their grantor. In other respects, the case is covered by the decision in *Montgomery v. Middlemiss*, (ante 103,) recently rendered. Upon that authority the order of the District Court must be reversed, and that Court directed to issue a writ of assistance as prayed in the petition of the plaintiff.

Ordered accordingly.

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FRINK v. MURPHY.

REDEMPTION BY JUNIOR MORTGAGEE.—A junior mortgagee, not made a party to a suit for foreclosure of a prior mortgage, has the statutory right of redemption within six months from a sale made under a decree in such suit, and retains also the general equitable right of redemption which exists independent of the statute. If made a party to the foreclosure suit, his equitable right of redemption is barred, but he is still a redemptioner under the statute.

**STATUTORY RIGHT TO REDEEM.**—Although the decree ascertains the amount of his lien and directs its payment out of any surplus proceeds of the sale remaining after satisfaction of the prior lien, his statutory right to redeem is not thereby destroyed, but still exists as to any portion of his demand not satisfied by the application of the surplus proceeds of the sale.

**SUBSEQUENT LIENS.**—\*The phrase, "*on which the property was sold*," occurring [109] in the two hundred and thirtieth section of the Practice Act, refers to the lien which the action was brought to enforce, and does not apply to the liens of subsequent incumbrancers who are made parties.

**REDEMPTIONERS ASSIGNEES OF JUNIOR MORTGAGEE.**—In a suit to foreclose a mortgage, K., a junior mortgagee of the premises, was made a party, and in accordance with the prayer of his answer the decree declared the amount of his lien and ordered the application of any proceeds of the sale remaining after satisfaction of the prior mortgage to be applied to its payment. The premises were sold under the decree to F. for an amount more than sufficient to satisfy the first mortgage, and the surplus was paid to K., but leaving the larger portion of his claim unsatisfied. This balance was assigned by K. to G. & B. who within the six months tendered the Sheriff the amount required by statute to redeem from the sale: *Held*, that G. & B. were redemptioners under the statute, and that F. was not entitled to the Sheriff's deed.

#### APPEAL from the Third Judicial District.

The facts are sufficiently stated in the opinion.

*L. Archer*, for Appellant.

I. The assignees had no lien by mortgage, for the reason that the mortgage of Kealy was merged and extinguished by the judgment in the foreclosure suit. (*Kittridge v. Stevens*, 16 Cal. 382; *The People v. Beebe*, 1 Barbour, 388; 10 Tex. 99; 1 Dennis, 407.) It is believed that no case can be found in which the adjudication was otherwise.

II. The mortgage of Kealy if not merged was not a lien upon the property sold subsequent to the judgment on which it was sold, for the reason that the mortgage and the lien thereof were anterior to that judgment.

III. The judgment of Kealy was not a lien upon the property sold subsequent to the one on which it was sold, because the judgment in favor of Esnault and in favor of Kealy was all one judgment, and the property was sold under that judgment. (Pr. Act, secs. 144, 145; 16 Cal. 382.)

IV. The making of a subsequent mortgagee a party to a suit for a foreclosure may not debar his right of statutory redemption, if he does not set up his mortgage and obtain a decree in his favor. But in this case Kealy prayed for the

<sup>1</sup> *Eldridge v. Wright*, 55 Cal. 533; *Black v. Gerichten*, 58 Cal. 58. See 31 Ark. 100.

sale of the mortgaged premises, and obtained a decree [110] in his favor for his part of the proceeds \*of the sale and received it. How then can he say the property was not sold for him and under his judgment? As well might Esnault have claimed the right to redeem if the property had not realized enough to satisfy his demand. To prevent this very thing the act has been specially framed.

V. The property having been sold under the judgment and decree in *Esnault v. Williams*, that judgment could no longer be a lien upon the property. (See *Bowman v. Hovious*, 17 Cal. 471.)

*John H. Moore*, for Respondent.

I. The judgment of the Court denying the *mandamus* is correct. Kealy was a judgment creditor of mortgagor Williams. Said judgment was a lien on the premises in question, subsequent to the Esnault judgment, though rendered at one and the same time and in the same decree. The assignees being subsequent incumbrancers were redemptioners. (Pr. Act. 230.) It is denied that the Kealy mortgage is merged in the Esnault judgment; but if extinguished and merged by the foreclosure suit, it is merged in the Kealy judgment, which is of necessity separate from the Esnault judgment. It is contended that no principle in equity would take from Kealy vested rights and give them to Esnault. But were it, as contended by counsel, that the Esnault and Kealy judgments are one and the same, Kealy would be without remedy; Esnault would have the power to satisfy the judgment and defeat entirely Kealy's judgment—he being the prior judgment creditor having control of the judgment.

II. Younger mortgagees have a subsisting interest in the estate mortgaged, and have a right to pay off prior incumbrancers in order to make their own claims available. (10 Cal. 552; Story's Eq. 1023.)

III. The obvious policy of the law is, that the estate of a judgment creditor should be so managed as to liquidate the largest amount of his debts, and Courts, in giving construction to remedial statutes, will so construe them. (2 Cal. 595.)

The Esnault judgment was satisfied by the sale of the premises. Kealy's judgment was not satisfied. The legal

estate of the premises was still in the judgment debtor, Williams, until the delivery of \*the Sheriff's [111] deed. Kealy being a judgment creditor, and his lien not being extinguished, he or his assignee had a right to redeem.

NORTON, J. delivered the opinion of the Court—FIELD, C. J. and COPE, J. concurring.

This is an application for a *mandamus* to compel the defendant to execute a conveyance of certain property sold by him as Sheriff, etc. The application is contested upon the ground that the property has been redeemed, and the question is, whether the persons claiming to have redeemed it are redemptioners within the meaning of the statute? The sale was made under a judgment of foreclosure, and the persons redeeming are assignees of one Kealy, who was a junior mortgage creditor, and a party to the foreclosure suit. The decree of foreclosure ascertained the amount due to Kealy on his mortgage, and directed the proceeds of the sale, after paying the plaintiff's demand, to be applied to the demand of Kealy, and a small sum was so applied, leaving, however, a large portion of Kealy's demand unsatisfied.

The embarrassment in this case is occasioned by a decision of this Court and subsequent statutory regulations applying the right of redemption from ordinary judgment sales to sales under a decree for the foreclosure of a mortgage. Aside from statutory regulations, a sale under a judgment gave the purchaser an indefeasible title as against any subsequent incumbrancers. By statute, a certain time was allowed to such incumbrancers to redeem from such a sale. But by a sale under a decree of foreclosure, the rights of no persons were affected who were not made parties to the action; but the rights of all who were so made parties were ascertained and provided for, and the subsequent incumbrancers were after such sale barred and foreclosed of all equity of redemption. As under our system, as now regulated, a right of redemption is given to subsequent incumbrancers from sales on foreclosure as well as on ordinary judgments, it would render the system more consistent if the same effect should be attributed to a sale under a decree of

foreclosure as under an ordinary judgment; that is, that it should give a good title against all subsequent incumbrancers, although not made parties, who did not redeem under [112] the statute. But it has been \*repeatedly decided by this Court that such incumbrancers were not cut off from their general right to redeem, unless made parties. In case, then, a subsequent incumbrancer is not made a party to a foreclosure suit, he has the right to redeem under the statute, and also his general right to redeem unaffected by the foreclosure. The second subdivision of section two hundred and thirty of the Civil Practice Act gives a right of redemption to a creditor having a lien subsequent to that *on which the property was sold*. Ordinarily, in this State, in an action to foreclose a mortgage, subsequent incumbrancers, as well by mortgage as by judgment, are made parties by a general averment that they have some claim or lien, and the decree makes no provision for their benefit, but bars and forecloses them from their general right of redemption. In such cases there can be no doubt that such subsequent incumbrancers may redeem under the statute, as they are embraced within the letter of its provisions. But in the present case, the amount due to Kealy as a subsequent mortgagee was fixed by the decree, and the proceeds of the sale directed to be applied on his mortgage next in order after the mortgage of the plaintiff in that action, and a portion of the proceeds were in fact applied on Kealy's mortgage. Under these facts, must it be held that the property was sold under Kealy's mortgage as well as under the mortgage which the action was specially instituted to foreclose? If so, then Kealy's assignees do not come within the letter of the statute, nor, perhaps, within its spirit. Strictly it may be said that the property was sold on Kealy's mortgage, since the proceeds were applied, after paying the plaintiff's claim, on his mortgage; but to hold that the expression, "on which the property was sold," can apply to any other lien than that which the action was brought to enforce, would lead to uncertainty and embarrassment in applying the right of redemption under the statute. Instead of having the simple criterion of the date of the successive liens as a guide, the terms of the decree would have to be consulted in order to

see if the proceeds were directed to be applied on any and which of the subsequent liens. The Legislature could not have reasonably intended such a criterion, and we should not so interpret the statute unless its terms peremptorily require it. Considering the whole system of redemptions as affected by our statutes, we think the phrase [113] "on which the property was sold" must be held to refer to the lien which the action was brought to enforce, and that it does not apply to the liens of subsequent incumbrancers who are made parties. The result is, that the assignees of Kealy had the right to redeem on their lien for the unpaid balance of the Kealy mortgage.

The order refusing a *mandamus* is affirmed.

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### SHERBOURNE v. YUBA COUNTY.

<sup>1</sup> COUNTIES WHEN NOT LIABLE FOR ACTS OF OFFICERS.—A *quasi* corporation, such as a county, is not liable for the acts of officers or employes which it appoints in the exercise of a portion of the sovereign power of the State by the requirement of a public law, simply for the public benefit, and for a purpose from which the county, as a corporation, derives no benefit.

<sup>2</sup> *IDEM*—FOR INJURIES BY PHYSICIAN.—Thus, a county is not liable in damages to one who, while an inmate of the County Hospital, sustains injuries from unskillful treatment by the Resident Physician, or from the failure on the part of the officers of the hospital to supply sufficient and wholesome food.

#### APPEAL from the Tenth Judicial District.

The complaint avers that on the seventeenth day of April, 1860, plaintiff, while a resident of Yuba County, had his leg broken by an accidental fall, and that being an indigent person he applied as such for admission to the County Hospital of said county, and was in due form admitted there-to as a patient; that during his stay in the hospital he was not furnished with sufficient food, and such as he did receive was unwholesome; that the bed furnished him was filthy and unclean; that he did not receive proper care from the attend-

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<sup>1</sup> Liability of county, cited as authority in *Crowell v. Sonoma Co.*, 25 Cal. 315; see *Huffman v. San Joaquin Co.*, post 426; *Barnet v. Contra Costa Co.*, 67 Cal. 78. See 44 Mo. 481; 54 Wis. 532; 71 Ill. 357.

ants; that the treatment of his broken limb by the physician was grossly negligent and unskillful, and that as a result he suffered much unnecessary pain and is now a cripple for life, while with proper treatment he would have entirely recovered from the effects of the fracture; that from this negligent and unskillful treatment he has sustained damages in the sum of \$30,000, for which the county is liable; that he presented his demand for this amount to the Board of Supervisors of the county, by whom it was rejected, and prays judgment for the said sum of \$30,000.

[114] \*The complaint was demurred to, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and judgment given for defendant, from which plaintiff appeals.

*C. E. DeLong*, for Appellant, made the following points:

I. Counties and like public corporations are subject to legislative control, and by statute may be made liable to the performance of duties such as one imposed by the laws concerning county hospitals. (*Coles v. The County of Madison*, Bre. 120.)

II. Counties may be sued *in tort* as well as in contract. (*McCann v. Sierra County*, 7 Cal. 124.)

III. The County of Yuba was bound by law to maintain its indigent sick and provide for them proper sustenance and skillful medical treatment. (Stat. of 1854, 131; Id. 1855, 67; Id. 1856, 69; Id. 1860, 191.)

IV. A municipal corporation, failing in the discharge of a duty imposed upon it by law, is liable in damages to one sustaining injury thereby. (4 Hill, 531; Just. 703; Cowp. 79; *Milede v. New Orleans*, 12 La. An. 15; *Rochester White Lead Co. v. The City of Rochester*, 3 Comst. 463.)

*F. L. Hatch*, District Attorney, for Respondent.

NORTON, J. delivered the opinion of the Court—FIELD, C. J. and COPE, J. concurring.

The plaintiff in this action seeks to recover compensation from the county of Yuba for the damage which he sustained by reason of the unskillful treatment he received from the



Resident Physician, and the insufficient and unwholesome food and other necessities supplied him while in the County Hospital as an indigent sick person.

A demurrer to the complaint was sustained by the Court below, and from the judgment the plaintiff has appealed.

The plaintiff insists that the county is required by law to provide for its indigent sick in a suitable manner, and is liable to an action for the misfeasance of its employés. No case has been cited to us in which such an action has been sustained; nor do we think this action can be sustained upon principle. Private corporations and \*mu- [115] nicipal corporations may be liable for the acts of their employés, of whom they have the appointment and supervision, and when the duty to be performed is for the benefit of the corporation. But a *quasi* corporation, like a county, is not liable for the acts of officers or employés which it appoints in the exercise of a portion of the sovereign power of the State, by the requirements of a public law, and simply for the public benefit, and for a purpose from which the county, as a corporation, derives no benefit. (*Fowle v. The Common Council of Alexandria*, 3 Pet. 398; *The Mayor, etc., of N. Y. v. Bailey*, 3 Hill, 531, and cases cited by Senator Hand at pp. 447, 448.)

Judgment affirmed.

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### CREIGHTON v. PRAGG.

\* **EFFECT OF REPEAL OF STATUTE.**—Where a contract is made and executed in pursuance of a statute, which also prescribes the parties against whom and the mode in which it may be enforced, the right to enforce it in the manner prescribed is a part of the contract, and is not affected by a subsequent act repealing the provisions in reference to the enforcement of the contracts authorized by the statute under which it was made.

\* **CONSOLIDATION ACT OF SAN FRANCISCO.**—The Consolidation Act of 1856, as amended in 1859, authorized the city authorities of San Francisco to enter into contracts

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<sup>1</sup> Act of 1861 not retroactive, cited as authority in *Houston v. McKenna*, 22 Cal. 554; see *Scarborough v. Dugan*, 10 Cal. 305.

<sup>2</sup> As to mode of assessment under amendment of 1859, see *Conlin v. Seaman*, 22 Cal. 546; *Houston v. McKenna*, Id. 553.

with individuals for grading its streets, and provided that the charges under the contract should be borne by the owners of the adjacent lots. Section fifty-nine authorized a contractor, upon the completion of his work, to sue each delinquent owner for the amount of his assessment. In March, 1861, a contract was entered into with plaintiff for grading a certain street, and the work under it was completed by him in April. May 18th, 1861, an act was passed repealing section fifty-nine. In August, 1861, plaintiff commenced the present action against one of the delinquent owners to recover the amount assessed against him: *Held*, that plaintiff's right to maintain the action was not impaired by the Repealing Act; that the right to sue the property owners was a part of the contract, and could not be taken away by legislation subsequent to his performance of the work.

#### APPEAL from the County Court of San Francisco.

The Act of 1856, consolidating the City and County of San Francisco, in an article upon streets, provides the mode in which contracts for their grading shall be let by the [116] Board of Supervisors, \*and for the assessment of the expense of the work upon the owners of the adjacent property. Section fifty-nine, as amended in 1859, is as follows:

"An action may be instituted and maintained, before any Court of competent jurisdiction, by the contractor or his assigns for work done and materials furnished upon street crossings under the provisions of this article against the several owners, assessed or liable therefor, for the recovery of the amount of their respective assessments or for repairs, as provided in section fifty-six of this act, which shall be deemed a remedy concurrent with the proceedings for the enforcement of such assessment and charges hereinbefore provided; and the entries kept by the Superintendent of Public Streets and Highways in the record book of assessments and charges, or a copy therefrom certified by the said Superintendent to be a true copy thereof, shall be *prima facie* evidence in said Court of the regularity of all the proceedings prescribed in this article."

May 18th, 1861, an act was passed amending the act above referred to, the eighteenth section of which is as follows:

"Sections fifty-one, fifty-five, and fifty-nine of the act to which this is an amendment, commonly called the 'Consolidation Act,' are hereby repealed. This act shall take effect and be in force from and after the first day of June next."

In March, 1861, the Board of Supervisors, in the form and mode prescribed by the act, awarded to plaintiff a contract

for grading a street adjacent to a certain lot owned then by defendant, and an assessment therefor was levied upon the property owners, including defendant, against whom the assessment was one hundred and twenty-eight dollars and twenty-one cents.

Plaintiff completed the work about the first of May, 1861, and on the twenty-fourth of that month received from the Superintendent a certificate authorizing him to collect from the several property owners the amounts assessed against them; and in August, 1861, having previously demanded of defendant the amount of his assessment, which was refused, commenced this action in a Justice's Court to recover the same.

The complaint sets forth in detail the performance by the city \*officers and by plaintiff of the various [117] requirements of the act preliminary and subsequent to the letting of the contract, the performance of the work by him, the certificate of the Superintendent, and the demand upon defendant and his refusal to pay. In stating the dates of the several acts, the form of the averment is, that "on or about" a certain day the act was done, and after setting forth the contract, it is averred that the plaintiff "duly performed" all the conditions therein on his part.

Defendant demurred to the complaint, and the demurrer being overruled, plead a general denial. On the trial, plaintiff had judgment, and defendant appealed to the County Court, where the case was tried anew with the same result.

In the County Court, defendant moved to dismiss the action, because of the insufficiency of the complaint, and objected to all the evidence of plaintiff when offered, and at the close of the trial moved to strike it all out, on the ground that "there was no evidence to prove any tax assessment or charge against the defendant."

The record book of the Superintendent, containing the entry of the assessment, and also a diagram of the street and lots adjacent was offered by plaintiff, and objected to by defendant, on the ground "that no predicate for its introduction had been laid."

All these objections and motions of defendant were overruled. Defendant moved for a new trial, which was denied;

and from this order and also from the judgment the present appeal is taken by him.

*S. H. Brodie*, for Appellant.

The claim is for a tax and is *stricti juris*. (4 Comst. 419-429; 12 Cal. 83, 478.)

I. The repeal of section fifty-nine of the Consolidation Act on June 1st, 1861, before the commencement of this action, takes away this remedy for the collection of the tax. (Stat. 1861, 553, sec. 18; *Butler v. Palmer*, 1 Hill, N. Y., 324.) It is not pretended that plaintiff had any contract with defendant.

II. The plaintiff must aver and prove all that the statute requires. (*Blanchard v. Beiderman*, 18 Cal. 261; *Dye v. Dye*, 11 Id. 165; 10 Id. 632, 633.) The averment that an [118] act is \**"duly"* done is bad. (1 Chit. Pl. 236, note *k*.)

When time is important, it must be averred with certainty; *"about"* will not do. (*Blackwell on Tax Titles*, 601.) The complaint is, therefore, defective.

As to the proofs, plaintiff did not pretend to make out a case by common law proofs. He introduced no evidence as to the work having been ordered by the Board of Supervisors, or as to any publication in a newspaper as required by law, or as to ownership of the land; but he relied solely upon supposed statutory or constructive proof—that is, on section fifty-nine of the Consolidation Act. But that section was repealed long before the commencement of this action by the Statute of 1861 (p. 553, sec. 18.) Of course, it was in the power of the Legislature to alter the rules of evidence.

III. The diagram and assessment not only do not show an assessment by quarter-blocks, as required by sections thirty-seven and forty-seven of the Consolidation Act, but they show that one quarter, instead of being one hundred and thirty-seven and one-half feet deep, was only assessed seventy feet. This objection alone is fatal to plaintiff's right to recover.

*Robert C. & David Rogers*, for Respondent.

I. Assessments under a street contract are in the nature of a tax, and as such, are a personal charge, as well as a charge on the property. (*People v. Seymour*, 16 Cal. 342.)

II. The repeal of section fifty-nine of the Statute of 1859,

(Consolidation Act, Laws of 1859, 146,) which alone gave a personal action and concurrent remedy, did not affect the right of respondent to recover. The contract was fully consummated under the Law of 1859, and the repeal of section fifty-nine was *pro tanto* unconstitutional, because the repealing act not only operated upon the remedy, but upon the obligations of the contract, and amounted to a denial of the right which had already accrued under the contract. (*McCauley v. Brooks*, 16 Cal. 30-33, and cases there cited.)

III. The diagram required to be made, only exhibits the lots which are assessed and chargeable for the work. The record book is the *prima facie* evidence of the regularity of all the proceedings, and it becomes conclusive proof in the absence of other testimony.

\*IV. The complaint is sufficient, and contains an [119] averment of every fact, proof of which is required. But there is no appeal from the order overruling the demurrer.

COPE, J. delivered the opinion of the Court—FIELD, C. J. and NORTON, J. concurring.

This is an action to recover of the defendant his proportion of an assessment levied to defray the expenses of work done on a street crossing in the city of San Francisco. The suit was brought under the fifty-ninth section of the Consolidation Act, and the first point made is, that in 1861, and prior to the commencement of the suit, this section was repealed. The repealing act is absolute in its terms, but it was not intended that the repeal should affect past contracts, for that would have been to impair their obligation, which the Legislature had no power to do. The section created a personal liability in the property holder, and gave the contractor a right of action against him for its enforcement, and an appeal affecting this liability would amount *pro tanto* to an abrogation of the contract. No point is made as to the validity of the section, but simply as to its repeal; and no effect can be given to the repeal as against a contract previously made and executed.

The other points do not seem to be well taken, nor are they stated with sufficient particularity to entitle them to much

consideration. It is objected to the complaint that an averment stating an act to have been "duly" done is bad, and that when time is important it must be averred with certainty, "about" not being sufficient. The portions of the complaint to which these objections apply are not pointed out; and in respect to the first, it is sufficient to say that where an averment stating an act to have been done would be good, the additional word will not make it bad. As to the second, we do not see that it amounts to anything more than an abstract proposition, for in reading the complaint we are unable to discover any averment in which time is material. On the trial of the case the defendant seems to have regarded his safety as depending upon his capacity to object, and the record discloses an array of exceptions rarely equaled. There is an exception for every step in the proceedings, and [120] the case found its way to a conclusion over a barrier of objections as formidable as legal ingenuity could make it. The points presented, however, are few in number, and so far as we are capable of understanding them, the questions involved are easily disposed of. It is contended that the diagram given in evidence shows that the assessment was improperly made; but we find on its face nothing to justify us in so regarding it. It appears in the record without explanation, and it is impossible from an inspection of it to determine whether the assessment was properly made or not. The warrant of the Street Superintendent was the only authority required by the plaintiff to demand payment, and together with the other evidence offered it was sufficient *prima facie* to entitle him to recover. The subsequent proceedings provided for relate to the remedy against the property, and have no reference to the concurrent remedy against the person. The appeal given is from the assessment, and not from the proceedings under the warrant.

Judgment affirmed

## HOFF v. BAUM.

NOTICE TO QUIT—SUBSEQUENT OCCUPATION, HOW CONSTRUED.—H. served upon his tenant B., who was occupying under him certain premises at a rent of two hundred and fifty dollars per month, a notice to quit. Before the time at which, by the effect of the notice, the tenancy would have terminated, B., through a third person, proposed to H. to continue his occupancy at a rent of three hundred dollars, with which proposal H. expressed himself satisfied, but did not in terms notify B. of his acceptance of it. B. continued to occupy the premises: *Held*, in an action by H. for rent at the rate of three hundred dollars per month, that it must be inferred that the subsequent occupation of B. was with the consent of H., on the basis of the proposal rather than as a trespasser, and that plaintiff was entitled to recover.

## APPEAL from the Fourth Judicial District.

The facts are sufficiently stated in the opinion. Plaintiff had judgment, and defendant appeals.

*James McCabe*, for Appellant.

\*It is not shown that Baum was ever informed that [121] Hoff was satisfied with the proposition to remain at an increased rent. Plaintiff's assent to it without notifying Baum that he accepted it, does not show that the understanding was simultaneous, reciprocal, mutual, or concurrent. Hence it is no contract. (Story on Cont. 81, sec. 128; *Cook v. Ozley*, 3 Term R. 653; 1 Chitty's Plead. 297; *Livingston v. Rogers*, 1 Caines, 584; *Tucker v. Wood*, 12 Johns. 190; *Keep v. Hall & Goodrich*, Id. 397; *Hayes v. Warren*, 2 Strange, 933; *Penn., Del. & Md. Steam Nav. Co. v. Dandridge*, 8 Gill & Johnson, 248; *Whitall v. Morse*, 5 Sergt. & R. 358; *Morrison v. Ives*, 4 S. & M. 652.)

The notice to quit terminating the tenancy on the twenty-fifth day of August, 1861, is fatal to this action, because the tenancy being thereby terminated, the relation of landlord and tenant did not exist after August 25th, (the time during which rent is claimed,) and assumpsit will not lie where that relation does not exist. Action in the nature of trespass for mesne profits is the only remedy. (3 Comyn's Dig., 1st Am. from 5th Lon. ed., Covenant F, 272; *Featherstonbaugh v. Bradshaw*, 1 Wend. 134; *Brach v. Grey*, 2 Denio, 84; *Birch v. Wright*,

1 Term R. 378; *Jackson v. Sheldon*, 5 Cowen, 348; *Smith v. Stewart*, 6 Johns. 46; *Bancroft v. Wardell*, 13 Id. 489.)

No presumption of a new leasing is raised by the continued occupation of Baum. (*Ballentine v. McDowell*, 2 Scammon, 28; *Hemphill v. Tevis*, 4 Watts & S. 535; *Boggs v. Black*, 1 Binney, 333; *Danforth v. Sargeant*, 14 Mass. 491; *Jackson v. Tyler*, 2 Johns. 444; *Boston v. Binney*, 11 Pick. 1.)

*Cook, Brownson & Hittell*, for Respondent.

COPE, J delivered the opinion of the Court—FIELD, C. J. and NORTON, J. concurring.

This is an action to recover the sum of \$1,200 for the use and occupation of certain premises in the city of San Francisco. The complaint sets up an agreement to pay a monthly rent of three hundred dollars for the use of the premises, and the question is whether this agreement has been [122] proved. It appears that the \*defendant had been occupying the premises at a monthly rent of two hundred and fifty dollars, and that the plaintiff served upon him a notice to quit. The effect of this notice was to terminate the tenancy on the twenty-fifth of August, 1861, previous to which time the defendant proposed to the plaintiff, through the agency of a third person, to continue his occupancy at a rent of three hundred dollars. This proposal was communicated to the plaintiff, who expressed himself as satisfied with it, but there is no positive evidence that he notified the defendant of his acceptance. The defendant remained in possession, however, and the inference is that he did so with the consent of the plaintiff, and that the proposal was accepted. We must infer this, or infer that he kept possession against the plaintiff's will and as a trespasser, and of the two inferences we adopt the former.

The judgment is affirmed.



## PIERSON v. McCAHILL.

<sup>1</sup> **ORAL EVIDENCE TO VARY WRITTEN INSTRUMENT.**—The rule that verbal evidence is inadmissible to contradict or vary a written contract, is inapplicable where a mistake has been made and the object is to correct it.

**REFORMATION OF CONTRACT.**—Where in reducing an agreement to writing a material clause has been omitted by mistake, a party seeking to avail himself of the actual contract must obtain a reformation of the writing, either by a distinct proceeding to reform it or by specially pleading the mistake in the action in which the contract is sought to be used, and asking its correction as independent relief. Under a pleading which simply states the terms of a contract, the introduction of a written agreement respecting the subject matter cannot be followed by oral proof of a material clause alleged to have been omitted by mistake from the writing.

**AGREEMENT INVALID FOR WANT OF CONSIDERATION.**—An agreement between a debtor and a single creditor for the acceptance by the latter of an amount less than the debt in satisfaction, is invalid for want of consideration; but such an agreement between a debtor and two or more creditors is valid, the engagement of one being a sufficient consideration for that of the others.

**SERVICE OF ATTACHMENT; EFFECT OF.**—The service upon the defendant, in an action to recover money, of a writ of attachment at the suit of a third person against the plaintiff, cannot be plead by the defendant in bar of a recovery. The only effect of the service of the attachment is to suspend the proceedings until the determination of the suit in which it is issued.

**\*APPEAL from the Fifth Judicial District.**

The complaint avers that in February, 1861, the defendant, Philip McCahill, was indebted for goods sold and delivered to Taaffe, McCahill & Co., in the sum of \$1,784 64, and to Canfield, Pierson & Co., in the sum of \$967 89; and that this indebtedness was at that time, for a valuable consideration, sold and assigned by said creditors to the plaintiff, and has not been paid, and prays judgment for the amount and interest.

The answer denies the allegations of the complaint, and by way of further defense alleges "that on the — day of Dec. 1859, he (defendant) was indebted to Taaffe, McCahill & Co., and also to Canfield, Pierson & Co., with other creditors in various amounts, including all the indebtedness of this defendant contracted in the way of business; and that at said time a settlement and composition of all said debts was had and

<sup>1</sup> Cited as authority in *Hathaway v. Brady*, 23 Cal. 124; and *Pierson v. McCahill*, Id. 254. See as to relief from mistake, *Wagenblast v. Washburn*, 12 Cal. 212; *Palmer v. Vance*, 18 Cal. 557; *Eldridge v. See Yup Co.*, 17 Cal. 56; *Lestrade v. Barth*, 19 Cal. 660; *Pierson v. McCahill*, 21 Cal. 122. See also *Coles v. Soulsby*, ante 47, and note. B. C., 22 Cal. 127; *Isenhoot v. Chamberlain*, 59 Cal. 637.

agreed upon by and between the defendant and said creditors, whereby the said Taaffe, McCahill & Co., and the said Canfield, Pierson & Co., with said other creditors, agreed with said defendant to accept and receive from him by way of composition, the sum of fifty cents on the dollar of said indebtedness in full payment and satisfaction of all such indebtedness, respectively, which the defendant did then agree with them to pay, and which this defendant, in pursuance of said agreement, did pay to all said creditors in full satisfaction and discharge of their several claims against him.

"And all said creditors, including Taaffe, McCahill & Co. and Canfield, Pierson & Co., accepted and received the said payments severally in full satisfaction and discharge of the amounts so due them, as aforesaid, excepting the sum of ninety-nine dollars, a balance remaining due to said Taaffe, McCahill & Co., according to the terms of said settlement and composition on the seventh day of February, 1861, and which amount was garnisheed in the suit of *Falkner, Bell & Co. v. Taaffe, McCahill & Co.*, by process issued out of the District Court in the Twelfth Judicial District, City and County of San Francisco, whereby defendant was restrained and prevented from paying the same, and still holds said amount subject to the decision in said action. And [124] defendant avers that the \*accounts sued upon in this action are the same satisfied, settled, and discharged as above alleged."

The replication denied the new matter set up in the answer.

On the trial, the defendant introduced in evidence an agreement of composition, of which the following is a copy.

'In consideration of one dollar paid to me by my several creditors, a schedule of which is hereby attached, and in consideration of their several accounts against me, amounting in all to about \$12,000, I hereby assign, sell, make over, and transfer, to William Higgins, their lawful agent and attorney, my whole stock of goods contained in my store in the city of Stockton; also all accounts, debts, and notes due me, with the understanding that they shall, through their agent, realize out of the same sufficient to pay each and every one of them fifty cents for every dollar I owe them, and that after this amount is realized they agree to place me again in possession

of the remaining stock, uncollected accounts, and notes. McCahill has the privilege of taking out of the proceeds of the goods and debts one hundred dollars per month for personal and family expenses. In witness whereof, I have hereunto set my hand and seal. San Francisco, Dec. 21st, 1859.

“P. McCahill, [SEAL.]

“We, the undersigned creditors of P. McCahill, agree to the foregoing contract:

“Janson, Bond & Co.....	\$1,442 04
“Taaffe, McCahill & Co.....	4,122 07
“T. Henderson.....	886 69
“H. Cohn & Co.....	960 50
“Durung, Donnelly & Co.....	446 83
“L. & M. Sacks & Co.....	419 04
“T. J. Coffin & Co.....	318 12
“Canfield, Pierson & Co.....	1,600 00
“Jones, Tobin & Co.....	697 59
“Myger, Wolf & Co.....	337 75
“S. Mikkol.....	754 87
“Meushbeuter & Bertherd.....	229 52
“Badger & Lindenberger.....	221 37”

“\*The defendant then offered to show by witnesses [125] that plaintiff’s assignors were present at the meeting of creditors at which the written contract was negotiated, and that the creditors had there agreed to fully release and discharge the defendant upon the payment of fifty cents on the dollar of their respective claims; and that the agreement was drawn up by the request of the creditors, and that by mistake the person who wrote it left out the words “in full satisfaction and discharge of their respective claims against defendant,” and that it was the intention of the creditors to discharge the defendant upon the payment of fifty cents on the dollar.

To this evidence the plaintiff objected, on the ground that the proof was in effect to vary a written agreement, and was inadmissible under the pleadings. The Court overruled the objection, and the plaintiff excepted.

The defendant also offered in evidence a copy of the writ of attachment referred to in the answer with proof of a notice of

garnishee to him, which, under exception by plaintiff, was admitted.

The jury found a verdict for defendant, in accordance with which judgment was entered. Plaintiff moved for a new trial, which was denied, and from this order and the judgment the appeal is taken by him.

*Tompkins & Compton*, for Appellant.

I. The Court erred in holding, that parol evidence was admissible to show that the words "in full satisfaction and discharge of their respective claims," were at the time of making the written agreement between McCahill and his creditors, left out by mistake.

1st. The evidence was inadmissible under the pleadings, no mistake in the agreement being alleged in the answer; therefore, neither parol or other evidence could be given under this answer to show that fact. Parol evidence is inadmissible to vary, contradict, or add to a written agreement. (*Palmer v. Green*, 6 Cow. 14; *DeLong v. Stanton*, 9 Johns. 38; *Efner v. Shaw*, 2 Wend. 567; *Sessions v. Barfield*, 2 Bays, 594; *Brannan v. Mesick*, 10 Cal. 95; *Lee v. Evans*, 7 Id. 424.)

2d. If there be any mistake in the agreement, it cannot be shown in this collateral way. The remedy in such a [126] case is to \*seek the aid of a Court of Equity to correct the mistake. If it was possible for the defendant to avail himself of it in this action, it could only be after setting it up fully in the answer, and thus enabling the plaintiff to take issue upon it and prepare to meet it at the trial.

II. The Court erred in allowing parol evidence to be given to show that prior to and contemporaneous with the making of the written agreement it was the intention of McCahill's creditors to discharge him upon the payment of fifty cents on the dollar.

The intentions of the creditors are all merged in the written agreement itself, and whatever the contracting parties did not choose to incorporate in the writing was waived, and the writing cannot now be added to or varied by parol evidence. (*Austin v. Sawyer*, 9 Cow. 39; *Falconer v. Garrison*, McCord, 209; *Gibson v. Wall*, 1 McCord Ch. 409; *Creesy v. Holley*, 14 Wend. 30; *Palmer v. Green*, 6 Cow. 14; *DeLong v. Stanton*, 9 Johns.

38; *Sessions v. Barfield*, 2 Bays, 94; *Bertrand v. Byrd*, 5 Ark. 65; *Brannan v. Mesick*, 10 Cal. 95; 2 Ark. 383; 7 Ves. 218; 4 Taunt. 786; 2 B. & C. 684; 1 Murph. 426; *Man. Co. v. Heald*, 5 Green. 381; *Brigham v. Rogers*, 17 Mass. 581; *West Man. Co. v. Siarle*, 15 Pick. 225; *Kellogg v. Richards*, 14 Wend., stated and noted, 451; *Wilson v. Harrison*, 3 Fairf. 58; *Small v. Quincy*, 4 Green. 497; *Wesson v. Carroll*, 1 Ala. 251; *Hamilton v. Wagne*, 2 Marsh. 331; *Bond v. Hass*, 2 Dall. 133; *Lee v. Biddle*, 1 Id. 175; *Pleasants v. Pemberton*, 2 Id. 196; *Norton v. Well*, Tyler, 381; *McMunn v. Owen*, 1 Yates, 135; *Morris v. Edwards*, 1 Hanson, 189; *Smith v. Goddard*, Id. 178; *O'Hara v. Hall*, 4 Dall. 340; *Clark v. McMillan*, 1 Car. Law R. 265; *Summerville v. Stephenson*, 3 Stewart, 271; *Eupuy v. Gray*, 1 Ala. 357; *Adams v. Beard*, 1 Blackf. 191; *Butler v. Suddith*, 6 Mon. 541; *Brayton v. Fowler*, 5 Mass. 1; *Cozzins v. Whitaker*, 3 Stewart & Porter, 322; *Stackpole v. Arnold*, 11 Mass. 27; *McFarlan v. Moore*, 1 Term Rep. 174; *Washburn v. Cordie*, 15 Pick. 53; *Johnson v. Miller*, 14 Wend. 199; *Brewster v. Countryman*, Id. 416; *Veacock v. McCall*, 1 Guff. 329; *Condiel v. Stevens*, 1 Mon. 74; *Horvey v. Grabham*, 5 Adoph. & E. 361; *Dean v. Mason*, 4 Cow. 428; *McKuman v. Hender-son*, 1 Penn. 417; [127] *Vandervoort v. Smith*, 2 Caines, 141; *Parkhurst v. Van Causlandt*, 1 John. Ch. 822; *Stephens v. Cooper*, Id. 425, 429; *Gilpins v. Consignee*, 1 Pet C. C. 85; *Hovey v. Newton*, 7 Pick. 29; 1 Con. 122; *Randall v. Phillips*, 1 Mason, 378, 383; *Durham v. Baker*, 2 Day, 137; *Tribble v. Oham*, 5 Marsh. 141; *Perrini v. Cheeseman*, 6 Halst. 174; *Boriman v. Johnston*, 12 Wend. 566; *Johnston v. Blackman*, 11 Cow. 350-353; *State v. Collins*, 6 Hanne, 142; *N. Y. Gas L. Co. v. Mec. Fire Ins. Co.*, 2 Hall, N. Y. 108; *Bradly v. Bently*, 8 Vt. 243; *Franklin v. Long*, 7 Gil. & John. 407; *Butch v. The Penn. Coal Co.*, 4 Rawle, 130; *Borger v. Foster and Bail*, Id. 540; *Brooks v. Mabbie*, 4 Stewart & Porter, 96; *Hightown v. Joy*, 2 Porter, 311, 312; *Mad v. Steger*, 5 Id. 504.)

III. The garnishment of defendant was no bar to the action; it could only operate as a suspension of proceeding until the attachment proceedings were disposed of. (*Drake on Attach.* secs. 700, 701; *McFadden v. O'Dowell*, 18 Cal. 160.)

*D. S. Terry*, for Respondent.

The written agreement of composition does not purport to be an entire contract, or to express fully the intention of the parties; it is simply an assignment of the personal chattels, and the respondent is not bound by its recital as to consideration, but may show, by parol, other and additional considerations than those expressed in the paper. (*Emmonds v. Littlefield*, 13 Me. 233; *Tyler v. Carleton*, 7 Greenl. 175; *Wallace v. Wallace*, 4 Mass. 135; *Wilkinson v. Scott*, 17 Id. 249.)

The evidence excepted to was offered to prove that the consideration for the assignment was on the part of the creditors to accept it as a full satisfaction of their claims against the respondent. This evidence was properly admitted. (See cases above cited; 1 Parson's on Cont. 355, and notes.) No attempt was made, nor any evidence introduced, to vary or contradict the terms of the agreement introduced in evidence.

The respondent only sought to show the intention of the parties to the agreement, and the consideration which induced him to enter into it. This, as we have already shown, he had a right to do.

[128] \*COPE, J. delivered the opinion of the Court—  
FIELD, C. J. and NORTON, J. concurring.

This is an action upon two accounts, one in favor of Taaffe, McCahill & Co., and the other in favor of Canfield, Pierson & Co., for goods, wares, and merchandise sold and delivered. The plaintiff sues as assignee of these accounts, and the defendant sets up in defense a composition between him and the assignors of the plaintiff, by which it was agreed that upon the payment of fifty per cent. of the amount due he should be discharged from liability. He avers performance on his part, except as to a small balance upon the account of Taaffe, McCahill & Co., and as to that avers that it has been attached in his hands at the suit of a creditor of that firm. On the trial of the case, the defendant gave in evidence a written agreement between him and his creditors, transferring to a trustee certain property, from the sales of which he was to pay the amount agreed on, but containing no provision for a discharge. Parol evidence was introduced to show that this

provision was omitted by mistake, which evidence was objected to as improper, and its admission is assigned as error.

It is well settled that verbal evidence is inadmissible to contradict or vary a written contract, but this rule is inapplicable where a mistake has been made, and the object is to correct it. In this case, however, the mistake is not averred in the answer, and the agreement having been given in evidence without regard to the mistake, oral testimony was not admissible to vary it by the incorporation of a new term. There is no doubt of the power of the Court to reform the instrument, but this could only be done upon a direct application, and the matter should have been stated in the answer as a distinct ground of relief. Until reformed, the instrument must stand as the contract of the parties, and it was error to allow the defendant to prove a different contract, or to give evidence of an intention different from that actually expressed. The rule upon the subject is universal and inflexible, and until the contract has been reformed so as to express the intention of the parties, the defendant cannot claim the benefit of that intention.

A point is made as to the validity of the agreement as stated in \*the answer, it being contended that the [129] agreement as therein set forth is without consideration and void. The answer states an agreement to accept fifty per cent. of the amount due, etc., and the authorities are unanimous that as between a debtor and a single creditor such an agreement is invalid. Where, however, several creditors are parties to the agreement the rule is different, the engagement of one being a sufficient consideration for the engagement of the others. This is the only consideration appearing in the answer, but the agreement given in evidence shows an additional consideration in the transfer of property for the payment of the amount. As it will be necessary to amend the answer before the case is retried, the foundation for the objection made, even if it were tenable, will be removed.

The only further point necessary to be noticed is in regard to the attachment, which we think is not so pleaded as to be effectual for any purpose. It is averred that an attachment was issued and levied, but beyond this nothing appears in relation to the attachment suit, except the names of the

parties and the Court in which it was brought. The nature of the suit is not stated, nor is it alleged that the suit is still pending and undetermined, and the facts disclosed are insufficient to prevent a recovery. In no event was the defendant entitled to a judgment, for the only effect which the attachment could have was to suspend the proceedings, and whether well pleaded or not it was erroneous to treat it as a bar.

The judgment is reversed, and the cause remanded.

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### HUMISTON v. SMITH *et al.*

**REVIVAL OR ENFORCEMENT OF JUDGMENT.**—The writ of *scire facias* is a remedy unknown to our practice, and cannot be employed for the revival or enforcement of a judgment.

**CIVIL ACTION—WHAT IT INCLUDES.**—The term "civil action" in that section of the Practice Act, providing that "there shall be in this State but one form of civil action for the enforcement, etc.," includes the remedies provided for the enforcement of judgments.

**REMEDIES EXCLUSIVE.**—The system of remedies provided by our Practice Act is exclusive, and when it provides an adequate remedy no other can be pursued.

[130] \*APPEAL from the Third Judicial District.

On the twenty-fifth day of February, 1861, the appellants applied to the Third District Court for the county of Alameda for a writ of *scire facias*, to enforce a judgment for some \$10,000, previously recovered by them in said Court against the respondents, and then unsatisfied. The writ was issued, directed to the Sheriff of the county, and commanding him to make known to the defendants in the judgment (respondents here) that they must appear before the said Court at a day named and show, if they or either of them knew anything, why the plaintiffs should not have execution upon the judgment.

The writ having been returned served, the defendants on the day fixed to show cause appeared and moved to quash the writ, on the ground that it was not a form of remedy which was authorized by our law.

The motion to quash was granted, and the plaintiffs having excepted to this order now appeal from it.

<sup>1</sup> *People v. Jordan*, 65 Cal. 651.



*J. B. Townsend*, for Appellant.

That no provisions on the subject of the writ of *scire facias* or proceeding thereunder are to be found in our Practice Act may be admitted. The writ may, therefore, in that sense, be said to be "unknown to our code."

But there are other writs which are equally "unknown to our code," which nevertheless exist, and may be issued and prosecuted in this State. The writ of error is, in like manner, unknown to our code, and yet it issues from this Court, and is the continuation of an action brought in the lower Court for the purpose of review and reversal if found erroneous in cases where an appeal has not been provided by our Practice Act.

The writs of assistance and sequestration are likewise "unknown to our code," and yet are issued whenever required, to enable a party to obtain the full benefit of a judgment in his favor, or to execute such judgment, or enforce an order of the District Courts.

These latter two writs, it is true, are issued in chancery cases; but the provisions of our code, or Practice Act, purport to be complete, and are as fully applicable [131] to that class of cases as to those at common law. No distinction is made in the form of action, or in the mode of proceeding, whether the remedy is legal or equitable. In both classes of cases, a common form of action is prescribed, and an outline of the proceedings to final judgment and execution is laid down. But to carry into complete execution and effect such judgment when obtained, the Courts may and do issue any and all other writs known to either the common law, or chancery systems of practice. Their right to do this is expressly recognized, if not conferred, by the twenty-second section of the "Act concerning Courts of Justice and Judicial Officers." (Wood's Dig. 150, art. 644.)

No writ, therefore, known to the common law or chancery practice, and which is necessary or proper to enable our Courts to carry into full execution and satisfaction the judgments rendered by them, can be "repugnant to" or "inconsistent with" the provisions of our Practice Act, merely because it is not named in it, and is, in that sense, unknown to it. The

whole error of the Judge below in this case arises from his considering the *scire facias* to revive a judgment as a new and independent action. The authorities, both English and American, clearly show that it is not. It is merely the continuation of the old action for the purpose of having the judgment which has already been rendered therein fully satisfied, if the same has not already been done. The writ is merely to call the defendant back into Court after the lapse of a certain length of time, to allow him to show, if he can or desires, that the judgment has been satisfied, before allowing the plaintiff an execution thereon.

Our Practice Act has made such writ unnecessary, if the plaintiff is able to obtain his satisfaction within five years from the rendition of the judgment, to that extent enlarging the time allowed by the common law. But if not so able he might, under the two hundred and fourteenth section and before its repeal by the Legislature of 1861, have likewise obtained an execution by motion before and by leave of the Court.

This, however, we apprehend, was not the only remedy which the judgment creditor might pursue. It is well [132] settled that the giving \*of a statutory remedy or proceeding for the enforcement of an existing right does not take away any previous remedies existing at common law, unless express words of repeal or prohibition are used. (*Farmer's Turnpike v. Coventry*, 10 Johns. 385; *Calden v. Eldred*, 15 Id. 220; *Clark v. Brown*, 18 Wend. 220; *Stafford v. Ingersoll*, 3 Hill, 38; *People v. Craycroft*, 2 Cal. 244; *Rex v. Robinson*, 2 Barr, 803, 805.

At common law such creditor might have maintained a new action upon the judgment, which by lapse of time was presumed satisfied, and obtained a new judgment thereon and satisfaction thereof. (Coym's Dig. Debt, A 2; 1 Chit. Pl. 111; *Ames v. Hoy*, 12 Cal. 19.) Or he might (at least since the statute of Westminster 2d, 13 Edw. I., which is a part of the common law of England, as adopted in this State) have continued the proceedings in the original action by the writ of *scire facias*, which was in that class of cases an interlocutory writ in the nature of process for the purpose of obtaining a revival of the old judgment and execution and satisfac-

tion thereof. (2 Tidd's Practice, 1102, 1103, 1096, 1105, 1106; 2 Archb. Pr. 87.)

The nature and functions of this writ, in that class of cases, as a mere continuation of the prior action, are clearly shown by the following authorities: *Treasurer v. Foster*, 7 Verm. 52; *Wolf v. Penserford*, 4 Ham. O. 397; *Executors of Wright v. Null*, 1 Term, 388; *McGill v. Pereigo*, 9 Johns. 259.

There is nothing in the Practice Act of this State which either before or since the repeal of the two hundred and fourteenth section, has prohibited a party from selecting and pursuing which of the several remedies, to enforce the payment of his judgment, he may choose. It is not questioned that if he brings a new action thereon, he must bring it in the one form prescribed by our Practice Act. But if his proceedings are merely in continuation of the former action, and for the purpose of obtaining an execution upon the judgment rendered therein, the same rule which would require him to adopt the form of an action for obtaining that relief, would require the adoption of the like form whenever a plaintiff applies for any other interlocutory or executive remedy. As before intimated, the repeal of the two hundred and fourteenth section has only \*taken away [133] the statutory mode of obtaining the satisfaction of a judgment after the lapse of five years. The two-common law modes of arriving at the same result, remain—that is the remedy by a new action thereon—in the nature of an action of debt, and that of a revival of such judgment by a continuation of the original proceedings.

*A. M. Crane*, for Respondent.

I. The writ of *scire facias* is not a common law writ. (2 Just. 469; 8 Bac. Abr. 600; Coke Lit. 6, 290; 3 Co. 12; 4 Mad. 248; 3 Wood, 189; 2 Rever's Hist. 190; 3 Bl. Com. 421, original paging.)

II. The writ of *scire facias* is prohibited by the Practice Act and inconsistent with its provisions, and therefore cannot be resorted to.

The first case to which we refer, and which really covers the entire ground and is decisive of the question, is that of *Cameron v. Young*, 6 How. Pr. 372. In that case a *scire*

*facias*, as authorized by the revised statutes of New York, had been issued to revive a judgment. On motion to set aside the writ, the question arose whether section four hundred and twenty-eight of the code as amended in 1849, whereby this writ was by name and in express terms abolished, applied to any other than records of a public nature. The Court (Harris J.) without deciding the question upon that section (428) held in express terms that, independent of that repealing section the writ was superseded by the code, being inconsistent with its general provisions. That the only legal way to proceed was by action—filing a complaint, issuing a summons, and demanding as relief that an execution be issued upon the judgment. And this decision is fully concurred in by Judge James, in *Alden v. Clark*, 11 How. Pr. 209, who says: “But Justice Marvin held in *Cameron v. Young*, 6 How. 372, that as a *scire facias* was an action, it was abolished by section sixty-nine of the code, in which decision I fully concur.” And Judge Mitchell, in 1 Abbott, 127, cites both of the foregoing decisions with approbation.

Our code, like that of New York, provides that [134] there shall be \*but one form of action, and one uniform mode of procedure, and the above authorities are in point and decisive.

III. The proceeding by *scire facias* is an action.

“A *scire facias* is considered as an action, or in the nature of an original. (2 Bouvier’s Law Dic. 499.) The defendant may plead to it, and it is in that respect considered as an action. (Id.)”

COPE, J. delivered the opinion of the Court—FIELD, C. J. and NORTON J. concurring.

This is an appeal from an order quashing a writ of *scire facias*, issued by the District Court for Alameda County, to revive a judgment. The writ recites that the judgment is unsatisfied, and requires the defendants to appear and show cause why the plaintiff should not have execution, etc. The relief sought by the writ is amply provided for by the Practice Act, and the remedy invoked is inconsistent with the provisions of that act. The act expressly declares that “There shall be in this State but one form of civil action for the en-

forcement or protection of private rights, and the redress or prevention of private wrongs;" and the terms "civil action" include the remedies provided for the enforcement of judgments. The intention was to adopt a uniform and complete system, and it is impossible to give effect to that intention if parties are at liberty to disregard the course of proceeding pointed out. The system, if it be a system at all, is necessarily exclusive, and the introduction of other remedies would destroy its uniformity and defeat the purposes of the act. There is some discussion in the briefs as to whether the remedy by *scire facias* is a part of the common law as adopted in this country, but in the view taken this question is immaterial. It is a remedy unknown to our practice, or if known is not applicable in a case of this character where appropriate remedies are expressly provided. The Courts of New York have frequently determined that the code of that State, the provisions of which are similar to those of our Practice Act, abolished and superseded the writ of *scire facias*. The subject was fully considered in *Cameron v. Young*, 6 How. Pr. 372, and *Alden v. Clark*, 11 Id. 209, and an examination of these cases will show that they are directly in point upon the question before us.

The order is affirmed.

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\*SHORES *et al.* v. SCOTT RIVER COMPANY *et al.* [135]

<sup>1</sup> DECREE OF FORECLOSURE, EFFECT OF.—A decree foreclosing a mortgage cuts off all right of such subsequent purchasers or incumbrancers as are made parties to the foreclosure action.

TENANT IN POSSESSION, WHO IS.—A person who, after the commencement of an action to foreclose a mortgage, acquires possession of the premises from one of the defendants and continues to occupy after a sale under the decree of foreclosure is a "tenant in possession," and liable as such to the purchaser for the rents and profits accruing between the sale and the execution of the Sheriff's deed.

MANAGING AGENT NOT A TENANT IN POSSESSION.—R. having a possessory interest in certain premises which had been sold under a foreclosure decree employed M. to manage the property, and receive all its proceeds and pay them over in certain

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<sup>1</sup> Cited as authority in *Grattan v. Wiggins*, 23 Cal. 35.

fixed proportions to R. and S.: *Held*, that M. was a mere agent of R. and not a "tenant in possession," and, therefore, not liable to the purchaser at the sale for the rents and profits.

**PURCHASER AT JUDICIAL SALE, RIGHTS OF.**—Whether the purchaser at a judicial sale can maintain an action for the rents and profits against the tenant in possession before receiving his deed from the Sheriff—*Query*.

### APPEAL from the Ninth Judicial District.

On the twenty-eighth of July, 1856, the Scott River Company mortgaged certain ditch property of which it was owner to the plaintiffs. In December, 1856, one Lamphier recovered a judgment against the company for \$1,319, and on the seventeenth of January, 1857, the property was sold under an execution upon this judgment, and Lamphier became the purchaser for five hundred dollars.

On the eleventh of February, 1857, the company executed to E. Steele a trust deed, by the terms of which he was to possess, manage, and take the profits of the property for the period of two years, and apply the net proceeds: first, to the payment of a debt due him, which was secured by a mortgage upon the property executed in 1855; and second, to the reimbursement of himself for advances which he agreed to make to the company for the purpose of enabling it to pay off certain other incumbrances, among which was the balance of the Lamphier judgment and his lien by his certificate of sale, which latter Steele was to purchase. Upon receiving his debt and the sums advanced by him, with interest, the property was to be surrendered by Steele to the company.

According to this agreement, Steele purchased the [136] Lamphier certificate of sale. This certificate he, on the third day of Sept., 1857, assigned to A. H. Steele, who, on the twenty-second day of April, 1859, assigned it to S. S. Richardson. In August, 1859, E. Steele also assigned to Richardson his bond and mortgage, and other claims against the company, with his rights under the trust deed.

In January, 1859, while Steele was in possession under the trust deed, plaintiffs commenced an action to foreclose their mortgage, making him a party defendant with the company, and on the twenty-third of March obtained a decree of foreclosure in the usual form, under which the property was sold on the eleventh of August, 1859, the plaintiffs becoming the

purchasers, for the sum of \$6,200, and receiving from the Sheriff a certificate of sale.

Between the commencement of the action and the sale under the decree, Richardson took possession under his assignment from Steele. Before his assignment, Steele had borrowed money of one Smyth, to be used in repairing the ditch, and had agreed with him that Peter McQueen should manage the ditch and collect the proceeds of sales of water, and pay one-fourth of them to Smyth and three-fourths to Steele; and after the assignment to Richardson, McQueen was continued by him and Smyth in the same position and under a like arrangement.

The present action was commenced October 14th, 1859, against the Scott River Company, E. Steele, S. S. Richardson, and Peter McQueen. The complaint charged that Steele, Richardson, and McQueen had been in possession of the ditch since the eleventh day of August, 1859—the date of plaintiffs' purchase under the decree of foreclosure—and had received the rents and profits, amounting to five hundred dollars per month; and that these parties were insolvent, and prayed a judgment against them for the back rents already received, and that a receiver be appointed to take charge of the property and receive its proceeds for the benefit of plaintiffs until the expiration of the time of redemption. A receiver *pendente lite* was appointed; defendants answered, and a trial was had before the Court without a jury, which resulted in a finding in favor of plaintiffs. A decree was entered that Richardson and McQueen pay to plaintiffs five hundred and twelve dollars for back rents received by them; that the temporary receiver \*should pay to plaintiffs the [137] money already received by him, and should continue to collect the rents during the remainder of the time for redemption, and pay them to plaintiffs under the order of the Court, and restraining all the defendants from receiving the rents during that period.

Defendants moved for a new trial, which was denied, and from this order and the judgment McQueen and Richardson appeal.

*Crockett & Crittenden*, for Appellants.

I. Any judgment in this case against McQueen is contrary to law, because McQueen was not in possession. He was a mere agent, and his possession was Richardson's. A judgment against both Richardson and McQueen clearly cannot be maintained. They were not jointly in possession. The case proceeds upon the idea that whoever had the money, whether he collected it directly from the property or received it from the person who did collect it, was liable to the plaintiffs for it. Upon the same principle, a creditor of Richardson receiving the money in payment of a debt would also be liable to the plaintiffs.

Richardson and McQueen could not both have the money. Upon proof that one had it, the other should in reason be discharged.

II. Neither Richardson nor McQueen was liable to any judgment in this action, because they were not "tenants in possession" within the meaning of the law. McQueen, as we said, was the mere agent of Richardson; and the latter held adversely to the plaintiffs and the company—for he held under the certificate of purchase and the contract.

By "tenants in possession" the statute means the judgment debtor, or any one in possession under him and who is liable to pay rent to him. The liability of one in possession is not altered nor enlarged by force of the sale; but after the sale he must pay to the purchaser what before he was liable to pay to the debtor. (*Reynolds v. Lathrop*, 7 Cal. 46.)

Here, Richardson was not liable to pay anything to the company. The income of the ditch he was to receive to his own use. Would one who entered, not under the [138] judgment debtor but adversely to him and under a claim of title, be bound to pay the rents to the purchaser? Would a subsequent mortgagee, who was in possession by consent of his mortgagor and entitled to apply the profits to his own debt, and who had not been made a party to a foreclosure of a prior mortgage, be bound to pay rent after a sale to the prior mortgagee as purchaser?

III. The whole proceeding is radically wrong. The case is not one of equitable jurisdiction at all. Even if Richardson and McQueen had been in possession within the meaning of the statute, they were entitled to the possession until the



expiration of the six months allowed for redemption, and were only liable for the rents and profits in a common law action for the value of the use and occupation.

They could not be ousted from the possession in the manner attempted in this case and effected by the judgment. (Pr. Act, secs. 235, 236; *Gay v. Middleton et al.*, 5 Cal. 392.)

The estate is not in the mortgagee nor in the purchaser until the deed is executed. The insolvency of a mortgagee and the insufficiency of the security constitute, therefore, no ground for the appointment of a receiver pending proceedings to foreclose, and it is error in such a case to appoint a receiver. (*Guy v. Ide*, 6 Cal. 99.)

Upon the same principle such an appointment after sale and before the execution of the Sheriff's deed, upon an allegation of insolvency of the tenants in possession, if such were the fact, which it was not here, is error.

*Geo. Cadwalader*, for Respondent.

The two hundred and thirty-sixth section of the Practice Act says: "The purchaser from the time of the sale until a redemption, and a redemptioner from the time of his redemption until another redemption, shall be entitled to receive from the tenant in possession the rents of the property so sold, or the value of the use and occupation thereof."

In *McDevitt v. Sullivan*, 8 Cal. 592, and *Harris v. Reynolds*, 13 Id. 514, this section has been construed. In the latter, it was held that the words "tenant in possession" were broad enough \*to include the judgment debtor himself as well as parties placed in possession by him. [139] That case is the fullest imaginable authority for this, and must necessarily control it—indeed, it goes much further than is necessary for us.

Steele was a party to the action foreclosing the mortgage, and the decree bound him, and barred whatever interest he had in the property. When thereafter he placed McQueen and Richardson in possession, they took subject to our decree—they could have no higher rights to the rents and profits than Steele had—and Steele's right had been declared subordinate to ours. McQueen is the mere agent or water rent

collector, as Reynolds was in *Harris v. Reynolds*, and liable upon the same principle.

Our mortgage being prior in point of time to the lease or grant to E. Steele, it was not in the power of the Scott River Company to make such a lease or grant of its rents as to prevent our right accruing under the statute to those rents.

COPE, J delivered the opinion of the Court—FIELD, C. J. and NORTON, J. concurring.

The Scott River Water and Mining Company executed to the plaintiff a mortgage upon certain ditch property in the county of Siskiyou. The mortgage debt not being paid, a suit was brought, and a decree obtained under which the property was sold—the plaintiffs becoming the purchasers, and receiving the usual certificate of sale, and at the expiration of six months thereafter a deed. The present suit was brought to recover the rents and profits during a portion of the time allowed for redemption, and to obtain an injunction and the appointment of a receiver. A judgment was rendered granting the relief asked; and from this judgment two of the defendants, McQueen and Richardson, appeal.

The matters chiefly relied on for a reversal grow out of certain transactions between the Scott River Company and one Steele. These transactions took place subsequently to the execution of the mortgage, and we do not see in what respect the rights of the plaintiffs were prejudiced by them. Steele was in possession of the property when the foreclosure suit was commenced, and was made a party to the suit; [140] and his rights, whatever they may have been, \*were cut off by the decree. Richardson came in under Steele, and as the tenant in possession, is undoubtedly responsible for the rents and profits. McQueen was the agent of Richardson, and though having the actual management of the property, can hardly be regarded as standing in the position of a tenant. His possession was the possession of Richardson; and we are of opinion that the remedy of the plaintiffs is confined to the latter. It is true, the proceeds arising from the use of the property went into the hands of the former, but the statute only gives a remedy against the tenant in possession. The right to recover rests upon the

statute; and the tenant in possession is the only person against whom the right exists. It is possible that, as against Richardson, so far as his personal liability is concerned, the suit was prematurely brought, but this point is not made. The suit was brought before the plaintiffs obtained a deed, and it may be a question as to whether a cause of action had then accrued. There is no doubt, however, that the plaintiffs were entitled to a receiver; and we think the judgment should be affirmed, except as to McQueen. To that extent it must be reversed, but we shall affirm it in other respects.

Ordered accordingly.

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### CARPENTIER v. GRANT.

**EJECTMENT—DESCRIPTION OF PREMISES IN COMPLAINT.**—A description of real property in a complaint in ejectment giving one of the lines bounding the premises as running due west to the *source* of a designated creek, is not so insufficient and indefinite as to sustain a demurrer on the ground of its alleged insufficiency. If there be in fact more than one *source* of the creek, that fact cannot be taken advantage of by demurrer. It can only be matter for proof on the trial.

**IDEM.**—A description of premises in a complaint as follows: "Commencing at a point in the Walnut Creek three hundred yards north of the Mt. Diablo base line; thence running due east two miles; thence due south to a point; thence *due west to the source of said Walnut Creek*; and thence down said creek to place of beginning;" *Held*, to be sufficient on demurrer.

**APPEAL** from the Fourth Judicial District.

The facts appear in the opinion.

\**H. W. Carpentier*, Appellant *in pro. per.*

[141]

*E. W. F. Sloan*, for Respondent, contended that the *source* of a stream is too indefinite a call for boundary to enable the defendant to answer intelligently, or the Sheriff, in the event of plaintiff's recovering, to give restitution; and cited 3 A. K. Marsh, 604; 2 Id. 163; 4 Bibb. 378; 8 Cowen, 427.

FIELD, C. J. delivered the opinion of the Court—COPE, J. and NORTON, J. concurring.

To the complaint in this case, which is an action of eject-

ment, a demurrer was interposed on several grounds, and among others, for alleged insufficiency of the description of the premises; and on this ground the demurrer was sustained. The plaintiff declining to amend the complaint, final judgment was entered for the defendant. The premises are situated in Contra Costa County; and the description given is as follows: "Commencing at a point in the Walnut Creek three hundred yards north of the Mt. Diablo base line; thence running due east two miles; thence due south to a point; thence due west to the source of said Walnut Creek; and thence down said creek to the place of beginning." The alleged insufficiency consists in the designation of the southwest corner as "*the source of said Walnut Creek.*" The description, it is contended, is indefinite and uncertain—as there may in fact be several sources of the creek. It is true there may be several sources—so there may be several channels; but if such be the case, the uncertainty of the description can only arise upon the proofs. In the absence of proof, we cannot presume such is the fact. The term "source" is defined by Webster as "Properly, the spring or fountain from which a stream of water proceeds, or any collection of water within the earth or upon its surface in which a stream originates." The complaint designates it as a certain and definite place, and for the purposes of the demurrer the designation must be taken as true. There may not be in truth any Walnut Creek in the county, and the description given may in consequence be an impossible one; but if such [142] be the case, the fact cannot be taken \*advantage of by demurrer. It can only be matter for proof on the trial.

Judgment reversed, and cause remanded, with leave to the defendant to answer upon payment of costs upon the demurrer and of the appeal in this Court.

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### PENNA v. VANCE.

**PART PAYMENT MUST BE EVIDENCED BY WRITING.**—A part payment does not take a debt from the operation of our Statute of Limitations, unless such payment is evidenced by a writing signed by the party to be charged thereby.

<sup>1</sup> *Idem*.—Section thirty-one of the Limitation Act excludes all acknowledgments and promises not in writing; and a promise implied from the fact of part payment constitutes no exception.

**MEMORANDUM ON BOND.**—A memorandum indorsed upon an overdue bond, stating a receipt of a portion of the debt, and also extending the time and changing in some respects the terms of payment, signed by the obligee alone, but assented to by the obligor, is not a writing "signed by the party to be charged thereby," and does not affect the operation of the limitation statute.

*Idem*.—If the signing of such a memorandum by the creditor and the assent to it by the debtor be viewed as a new and distinct contract for the payment of money, it would be a mere verbal contract, an action upon which would be barred by the lapse of two years from the time of payment fixed by its terms.

### APPEAL from the Seventh Judicial District.

This action was brought to enforce a vendor's lien for the purchase money of certain lands conveyed, on the seventh day of November, A. D. 1853, by Peña, the respondent, to Vance, the appellant. The purchase consideration was \$10,000; \$3,050 was paid in cash, and the personal bond of Vance, payable in one year, was given for the balance of \$6,950.

Nothing was paid upon the bond until November 6th, 1855. At this date the appellant and respondent met, by agreement, at the office of John Currey, Esq., in Benicia, and there, with his assistance as their mutual adviser, effected the arrangement which is evidenced by the memorandum indorsed on the bond—set forth in the opinion of the Court. Currey testifies that Peña was pressing for \*his money; and that Vance [143] was willing to pay a portion of it at that time, but desired an extension for the balance. The due-bill mentioned in the memorandum was given and subsequently paid by Vance. It appears by a subsequent receipt, indorsed on the bond, that on the tenth of November, 1856, Vance paid the interest, according to the terms of the memorandum, up to November 6th, 1856, and also \$1,200 on the principal. Since that time nothing has been paid.

The action was commenced August 9th, 1860. The answer set up two defenses; one the Statute of Limitations, and the

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<sup>1</sup> That the new promise must be in writing, cited as authority in *Heinlin v. Castro*, 22 Cal. 102; and *Porter v. Elam*, 25 Cal. 292. See *McCarthy v. White*, post 496. The doctrine affirmed in *McCormick v. Brown*, 36 Cal. 185; and see *Farrell v. Palmer*, 36 Cal. 192; *Chabot v. Tucker*, 39 Cal. 438, citing *McCormick v. Brown*, 36 Cal. 180, as authority.

other a failure of title to the property for which the bond was given. The plaintiff had judgment, and defendant appeals.

*John Reynolds*, for Appellant.

I. It is not contended that the cause of action upon the original bond survived at the commencement of this action, unless it was revived and extended by the indorsement of the sixth of November, 1855—it being payable more than five years before suit commenced.

The receipt indorsed on the bond on the sixth of November, 1855, does not take the case out of the operation of the Statute of Limitations.

1. It is not an acknowledgment or promise in writing, signed by the party to be charged thereby. (Wood's Dig. 49, sec. 31; *Fairbanks v. Dawson*, 9 Cal. 90.)

2. It is not such evidence of payment as to take the case out of the statute.

In the case of *Fairbanks v. Dawson*, this Court held that partial payment did not take a case out of the operation of the Statute of Limitations. In the case of *Barron v. Kennedy*, 17 Cal. 576, this Court held—the Chief Justice delivering the opinion—that when a payment is evidenced by writing, signed by the party to be charged, such payment, thus proven, will take a case out of the statute. And, as I understand the two cases, *Fairbanks v. Dawson* and *Barron v. Kennedy*, they hold that a partial payment has the same effect as a promise or acknowledgment, and takes the case out of the statute, and that this fact, either of partial payment, or [144] \*an acknowledgment, or promise, must be proved by a writing signed by the party to be charged

This receipt is signed by the plaintiff only, indorsed on the plaintiff's bond, and not signed by the defendant. No other evidence is given of a payment at this time, except the testimony of Mr. Currey, which is incompetent.

It may be contended that the giving of a due-bill by Vance was a payment evidenced by writing. This proposition is obnoxious to several objections.

1st. It did not operate as a payment—the payment depending upon parol proof. (*Griffith v. Grogan*, 12 Cal. 317; *Higgins v. Wartell*, 18 Id. 330.)

2d. The evidence that it was intended as a payment on this bond is not in writing, as in the case of *Barron v. Kennedy*. Both the object for which the due-bill was given and the payment of the same depended for proof upon other evidence, not in writing signed by the defendant.

3d. If the object of giving the due-bill or making partial payment could be proved otherwise than by a writing signed by the party to be charged, even then it would not avail to take this case out of the operation of the statute.

The receipt was indorsed on the bond four years and eight months before this suit was commenced; and the due-bill was paid soon afterwards, (it is presumed to have been paid when due,) more than four years and seven months before suit commenced.

An acknowledgment does not revive the old debt, but is evidence of a new promise of which the former debt is the consideration. (*Danforth v. Culver*, 11 Johns. 146.)

When this new promise is proven by writing, signed by the party to be charged, it may take effect from a day future, according to the terms of the writing; but when a partial payment is the evidence of the new promise, it must necessarily take effect on the day of the payment, and will be again barred in four years from such payment. So that, admitting this partial payment to have been made and proven by competent evidence, the new promise thereby proven is itself barred.

It is contended by respondent's counsel that the testimony proves \*a payment on the tenth of November, 1856; and that under the decision of the Court [145] in the case of *Barron v. Kennedy*, 17 Cal. 577, such payment operated as a renewal or as an acknowledgment of the indebtedness. I understand the rule, as laid down in that case, to be as before stated, that the fact of payment, like any other acknowledgment, must be proved by a writing signed by the party to be charged, and cannot be proved in any other way. It is averred in the complaint that a payment was made in 1856, but it is not averred that any written memorandum whatever was made of it.

II. The indorsement of the sixth of November, 1855, cannot be upheld as a new contract, on the part of plaintiff to

extend the time of payment, and on the part of defendant to pay the sum of \$5,200 on the sixth of November, 1856.

1. It would be void under the Statute of Frauds, so far, at least, as it affects the lien on the real estate, to foreclose which this action was brought. No estate or interest in lands can be created etc., except by operation of law, or by deed, or conveyance in writing, signed by the party to be charged thereby. (Wood's Dig. 106, sec. 6.)

2. This agreement did not operate to stay the commencement of plaintiff's suit on the bond for one year, as supposed. It not being signed by Vance, and, therefore, not binding upon him, it was not binding upon Peña. (*Lester v. Jewett*, 12 Barb. 502-505.)

The assumption in the opinion of the District Judge that Vance promised to pay is based upon the testimony of Mr. Currey, who swears that he acted for both Vance and Peña. It may be that Mr. Currey's testimony is sufficient to prove a parol promise to pay \$5,200. But such parol promise, if supported by a sufficient consideration, having no relation to the old debt, would itself be barred in two years from the sixth of November, 1856—nearly two years before this suit was commenced.

I have assumed that a verbal promise, based upon an old debt as a consideration, would be binding for two years. But this cannot be so, for it would be a complete evasion of the Statute of Limitations. Every new promise which operates to take a case out of the statute is a new contract based upon the old debt as a consideration.

[146] \*If, however, the forbearance of Peña is a consideration sufficient to support Vance's promise to pay the \$5,200, still it is no more than a parol promise, and barred long before the commencement of this suit.

If it is relied on, however, as an agreement in writing, then oral testimony is incompetent to prove that Vance agreed to it. Giving the utmost latitude to this testimony, it only proves a verbal promise on the part of Vance.

But, finally, suppose that this was a valid contract on the part of Peña to forbear to sue for one year, its only effect would be to suspend his action for one year, and thus add one year more to the original period. In this view of the



case, the action was barred on the seventh of November, 1859, and this action was not commenced until August 9th, 1860. It cannot, however, have this effect without directly contravening the thirty-first section of the Statute of Limitations.

*W. W. Stow*, also for Appellant, argued upon the question of failure of title to the property, which point is not referred to in the opinion.

*Whitman & Wells*, for Respondent.

I. It is contended that respondent is barred of his action by the Statute of Limitations. Even under the strict rule, as held in this State, this position is untenable. Chief Justice Field, in the case of *Barron v. Kennedy*, 17 Cal. 577, uses the following language: "Part payment has always been held sufficient to take the debt on which it was made out of the statute. Unless accompanied at the time with qualifying declarations or acts on the part of the party making the payment, it is deemed an unequivocal admission of a subsisting contract or liability, from which a jury is justified and bound to infer a new promise. The authorities are uniform to this point. And it matters not whether the payment be upon the principal or interest of the debt. And there is nothing in the thirty-first section of our Statute of Limitations which alters this well settled rule. \* \* \* This section does not purport to make any change in the effect of acknowledgments or promises, but \*simply to alter the mode [147] of their proof, and is directed, principally at least, against the admission of oral acknowledgments and promises, which constituted a fruitful source of embarrassment in the Courts of other States. Its chief object was to require that to be evidenced by writing which previously consisted of verbal declarations only."

Now, in this case we have the two writings indorsed on the bond—not signed by Vance it is true, but executed in his presence, and accepted by his acts—signed by the other party to be bound, and supervised, in one instance, by Mr. Currey acting for Peña and Vance jointly, and in the other, by Mr. Swan acting as the attorney of Vance, and by his direction.

Again, there is proof that, at the time of the first memorandum, Vance made and delivered his due-bill, which he afterwards paid.

There is no necessity, however, to discuss this point at length. There is no question, properly, here of the Statute of Limitations or the Statute of Frauds. The plain proposition here presented is, can a creditor give an indulgence to his debtor? Undoubtedly he may, either orally or in writing, subject, of course, to all risks of releasing compromisers or indorsers. The bond or obligation in this case, upon which indulgence was granted, though overdue, was not barred by the statute. It would not have been so barred, without the indulgence, until November, 1858. Prior, then, to this date the creditor, at the solicitation of the debtor, agrees, in writing, for a valuable consideration, to accept a portion of the sum due, give time for the payment of the balance, and reduce the rate of interest. The debtor accepts this indulgence: both parties subsequently act upon it. The time of payment was extended for one year from November 6th, 1855. Peña would have been unable to sustain an action against Vance until the expiration of the extended time, and it does not lie in the mouth of Vance now to deny the agreement, the benefit of which he has reaped. The proposition is too clear for argument.

II. But another rule may be invoked in respondent's aid. All the agreements in question were but parcel of and contingent upon an agreement of a higher nature—the conveyance of the land. The Statute of Frauds has in such [148] case no application. The rule \*is thus laid down by an elementary writer: "Where a deed has been actually executed, or a title to the land in any way passed, agreements between the parties as to pecuniary liabilities growing out of the transaction, but not going to take any interest in land from the grantee, are not affected by the statute. Thus, an agreement for releasing damages, for the taking of land for public uses, or for the use of it by statutory privilege, is binding without writing. And so, manifestly, is any special agreement to pay the price of land previously conveyed." (Browne on Stat. of Frauds, 274, sec. 270.)

COPE, J. delivered the opinion of the Court—NORTON, J. concurring.

The complaint alleges that in 1853 the plaintiff conveyed to the defendant a tract of land in the county of Solano, taking a bond for the payment of the purchase money. The bond is set out in full, and is conditioned for the payment of the money within one year from the date thereof, and indorsed upon it is a memorandum, as follows: "Received on the foregoing bond the sum of two hundred and fifty dollars, four cows at five hundred dollars, and a due-bill, payable in ten days, for \$1,000, leaving \$5,200, which the said Vance, named in said bond, is to pay interest upon at the rate of thirty dollars per month; and said sum so remaining due is to be paid by said Vance to said Peña in one year from this day. Said interest of thirty dollars is to be paid at the end of each month."

This memorandum is dated November 6th, 1855, and is signed by the plaintiff; and the evidence shows that it was assented to by the defendant, who subsequently acted upon it, but did not sign it. He paid the interest until the sixth of November, 1856, at which time he also paid a portion of the principal—the balance of the principal (with the interest which has since accrued) being still due. The suit was commenced in August, 1860; and the defendant relies upon the Statute of Limitations as a bar to the action.

Section thirty-one of the statute provides, that "no acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this statute, unless the same be contained in some writing, signed by the party to be charged thereby."

\*The first question that presents itself is, whether [149] cases of part payment are included in the provisions of this section, or whether these provisions are to be limited in their application to cases where the acknowledgment or promise is evidenced by words only and not by acts. In *Fairbanks v. Dawson*, 9 Cal. 89, the same question came up for consideration, and it was held—Mr. Justice Field dissenting—that part payment, in the absence of any written

acknowledgment or promise, was not sufficient to take the case out of the statute. In *Barron v. Kennedy*, 17 Cal. 574, the question was again presented; but as the payments in that case were evidenced by writing, the rule laid down in the former case was held not to be applicable—part payment being regarded as evidence of a new promise. “The statute,” said the Court, “does not purport to make any change in the effect of acknowledgments or promises, but simply to alter the mode of their proof; and is directed, principally at least, against the admission of oral acknowledgments and promises, which constituted a fruitful source of embarrassment in the Courts of other States. Its chief object was to require that to be evidenced by writing which previously consisted of verbal declarations only; and in *Fairbanks v. Dawson* this Court held, that it also covers an acknowledgment by payment. The counsel for the plaintiff asks us to reconsider this decision, and has presented a strong argument against its correctness. The present case does not, however, require any departure from it.” The language used seems to imply that in a proper case the Court would reconsider the question, and suggests such doubts as to the correctness of the decision as render it an insecure guide in future transactions. On examination of the matter a second time, we are satisfied that the statute intended to exclude all acknowledgments and promises not in writing; and that a promise implied from the fact of part payment cannot with any propriety be made an exception. The words of the statute are plain and unambiguous, and it is our duty to give effect to them, and carry out the intention of the Legislature as that intention has been expressed. Interpretation is only to be resorted to in cases of ambiguity, and it would be an evasion of the statute to hold that, notwithstanding the generality of the terms employed, cases of part payment are not included. The [150] \*words are: “No acknowledgement or promise;” and part payment is mere evidence of a promise, which is required to be in writing, and is not to be inferred from circumstances of which there is no written evidence. The English Statute, (9 Geo. IV.,) commonly known as Lord Tenterden’s Act, is expressly limited to acknowledgments and promises in words only, and provides that nothing therein contained

shall alter, take away, or lessen the effect of part payment. Our statute contains no provision of this character; nor is it limited to acknowledgments or promises in words only; its provisions are general, and exclude all acknowledgments and promises the evidence of which rests in parol merely. In *Willis v. Newham*, 3 Younge & Jer. 518, it was held, however, that the English Statute changed the rule of evidence, and that parol proof was inadmissible even in cases of part payment. This decision, though followed for many years, was finally overruled, but simply upon the ground that the statute was so worded as to exclude cases of part payment. Under a similar statute in Massachusetts, verbal testimony has been held to be admissible; and this, we believe, is the prevailing rule in other States where the statutes are the same. In *Williams v. Gridley*, 9 Met. 482, the decision was based upon the clause saving the effect of part payment, and the opinion shows that but for this clause the decision would have been different. In view of the comprehensive language of our statute, and the fact that there is no provision taking from its operation cases of part payment, we are of opinion that *Fairbanks v. Dawson* was correctly decided.

The next question is, whether the subsequent agreement, of which there is no written evidence except the indorsement upon the bond, is sufficient to take the case out of the statute? The Court below held that the statute had run as against the bond, but that the subsequent agreement was a good and sufficient contract in itself, and furnished a right of action independent of the bond. Four years had not elapsed from the time the money became due under the agreement, and it was held that, treating the action as an action upon the agreement, the period of limitation had not expired. The statute commenced to run, of course, when the money became due; and whether the limitation had expired or not depends upon whether \*the agreement is to be regarded as an [151] agreement in writing or by parol. The only writing is the memorandum signed by the plaintiff; and it is clear that this alone is not sufficient to establish the agreement—the assent of the defendant being necessary to make it binding upon him. On his part, therefore, the agreement is not in writing; and the only effect which can be given to it is to

treat it as a verbal contract, and so treating it, the right of action is barred by the statute. The counsel for the plaintiff do not claim, however, that the case can be sustained upon this ground, but rely upon the bond as the basis of the action, and upon the agreement as taking the case out of the statute. In this point of view the case is too plain to admit of argument, for the statute recognizes no acknowledgment or promise unless in writing, and it is immaterial that the promise was made in consideration of forbearance. The promise was to pay the debt, and the statute undoubtedly intended that such a promise, in order to be available as against the limitation imposed, should be in writing.

The judgment is reversed, and the cause remanded.

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### LEESE v. SHERWOOD.

**DISMISSAL OF ACTION, EFFECT OF.**—A dismissal of an action is in effect a final<sup>1</sup> judgment in favor of the defendant. It is a final decision of that action as against all claims made by it, although it may not be a final determination of the rights of the parties as they may be presented in some other action.

**IDEM—A FINAL DETERMINATION.**—On a sale of land by L. and wife to S. a portion of the purchase money was paid, and a balance of \$14,000 was by the terms of the deed to be paid when an action then pending by one Rico against the vendors, to recover a portion of the property, should be “finally decided” in favor of the defendants therein (plaintiffs here) “as against all claims made by said Rico.” By a contemporaneous agreement it was stipulated that a dismissal of the action of Rico should not be considered a final decision, provided a new suit for the same subject matter should be commenced by Rico on or before the eleventh day of April next succeeding the date of the agreement. The action of Rico was, on motion of the defendants therein dismissed, after the eleventh day of April, and thereupon L. and wife brought suit for the \$14,000: *Held*, that as the express stipulation about a dismissal evidently had reference to one procured before the [152] eleventh day of April, a dismissal after that day was not affected \*by the stipulation, but was to have such force as should result from the other terms of the agreement; that under those terms a dismissal at any time was a final determination of the action, and that plaintiffs were entitled to recover.

**ASSIGNMENT OF PORTION OF DEBT.**—An assignment by a creditor of a portion of a debt does not make the assignee a joint owner of the whole debt, and he is not a necessary party to a suit for its recovery.

**PARTIES IN SUIT FOR PURCHASE MONEY OF LAND.**—Where a vendor of land contracts with the vendee that he will pay off a mortgage previously executed by him upon the property, the mortgagee is not a necessary party to a suit for the purchase money brought by the vendor before the mortgage is discharged. A judgment, in such case, retaining the purchase money under the control of the Court until the mortgage is satisfied, is sufficiently favorable to the defendant.

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<sup>1</sup> *Porter v. Hopkins*, 63 Cal. 55. See 3 Neb. 254; 1 Mont. 209.

**APPEAL from the Fourth Judicial District.**

On February 28th, 1860, J. P. Leese and wife, plaintiffs, sold and conveyed to defendants Sherwood and Richard Hellmann a tract of land in Monterey county, called the Sausal Rancho, for the sum of \$32,000.

A suit was then pending in the Third District Court, brought by one Rico against the plaintiffs to recover a portion of said rancho, and in consequence of this, only \$18,000 of the purchase money was paid down by Sherwood and Hellmann, and by the deed to them it was agreed that the balance of \$14,000 was to be paid "when the suit now pending by Francisco Rico against the said parties of the first part (Leese and wife) shall be finally decided and determined in favor of said parties of the first part, the defendants therein, said suit being now pending in the District Court of the Third Judicial District in the said State, in the county of Monterey, and being for the recovery of said land and rancho; and upon said suit being finally decided in favor of the parties of the first part, as against all claim made by said Rico, then immediately said parties of the second part shall pay, as shall also their heirs and assigns, to said parties of the first, said sum of \$14,000."

On the same day with the execution of the deed plaintiffs and defendants entered into an additional agreement respecting the payment of the purchase money, in which it was provided that the vendors should "faithfully defend, at their own proper cost and expense, the actions now pending against them at the respective suits of Francisco Rico and Francisca de Moreno, in respect to the Sausal Rancho in Monterey county, with all proper and due care, \*and [153] diligence and attention." And Sherwood "covenants and agrees with said Leese, that he will, without unreasonable delay, say not to exceed one month, comply with the conditions of a conveyance of the Sausal Rancho, aforesaid, made this day by said Leese and wife to said Sherwood and one Richard Hellmann, by paying to said Leese the \$14,000, therein named, as a part of the purchase money unpaid; but it is understood that a dismissal of said aforesaid action of Rico against said Leese and wife, is not to be

considered a final decision in favor of said suit in favor of said Leese and wife; *provided*, said Rico, his heirs or assigns, shall recommence a suit, on the same subject matter, on or before the eleventh day of April next; and the said sum of \$14,000 is to become due and be paid upon a final decision of said action of Rico in favor of said Leese and wife, according to the terms of the aforesaid conveyance and of this instrument."

On the thirteenth of August, 1860, on the Rico suit being called for trial, the defendants therein (plaintiffs here) moved the District Court to dismiss it, on the ground that the complaint did not contain facts sufficient to constitute a cause of action, and the Court thereupon, without any trial being had upon the merits, dismissed said suit. No new action has been commenced by Rico.

The plaintiffs, on or about August 27th, 1860, gave notice to defendant of the dismissal of the Rico suit, and on or about September 28th, 1860, demanded of him the \$14,000.

On August 28th, 1860, Leese drew an order upon Sherwood and Hellmann, requesting them, out of the balance due on the sale to them of the Sausal Rancho, to pay to D. R. Ashley \$1,000, which order was presented to Sherwood about September 4th, 1860, and its payment refused by him, and thereupon he was notified by said Ashley that he should treat the order as an assignment *pro tanto* of so much of the balance of said purchase money as might be due, or become due, by appellant to the respondents.

This action was commenced on the twenty-eighth day of September, 1860, by Leese and wife to recover of Sherwood the \$14,000, balance of purchase money.

The complaint sets forth, in substance, the terms of the deed and of the cotemporaneous agreement, and avers [154] a performance in all \*respects of the covenants on the part of plaintiffs, and alleges that by the judgment of dismissal in the action of Rico, and the failure of the defendants therein to appeal, that suit is finally determined, and that no new action has been commenced in relation to the same subject matters.

The answer denies that the action of Rico is finally determined within the meaning of the terms of the agreement,



and also states the transaction with Ashley, and alleges that there is a defect of parties by reason of his nonjoinder as party plaintiff, and also by reason of the nonjoinder as party defendant of one Sullivan, who, it is alleged, had at the time of the sale a mortgage on the rancho for some \$4,000, which the plaintiffs covenanted to satisfy and discharge, but which was still a subsisting incumbrance.

A jury trial was waived, and the Court found the facts substantially as above stated, and also (in its fourth finding referred to in the opinion) that the action of Rico was finally determined. The mortgage of Sullivan was also found to be a subsisting charge upon the land, which the plaintiffs were bound to discharge.

As a conclusion of law, it was ordered that plaintiffs have judgment for the \$14,000, and interest from the time of its demand, less the \$1,000 for which the draft had been given to Ashley, and that the money, when collected, should remain with the Clerk, subject to the order of the Court, until the plaintiffs should file evidence of satisfaction of the Sullivan mortgage. From this judgment the defendant appeals.

*Sidney Smith*, for Appellant.

I. The dismissal by the Court of the Rico suit did not entitle the respondents to demand the \$14,000 from the appellant, within the true meaning of the agreement and of the deed.

The contract under which the appellant is to be held liable, if at all, is found not only in the agreement of February 28th, 1860, but in the terms of the deed made the same day, and to which, as containing part of the contract of appellant, the agreement expressly refers. The appellant, by the agreement, was to pay "according to the terms of the conveyance and of this instrument." The deed and the agreement, therefore, constitute but one instrument or contract, and [155] both must be resorted to in order to ascertain what were the liabilities which the appellant assumed. (Chitty on Cont., 90 and notes.) The deed calls for payment by appellant and Hellmann, when the Rico suit should be finally decided and determined in favor of Lease and wife as against all claim made by Rico therein. The Rico suit was for the

recovery of a part of the property sold by Leese and wife to the appellant and Hellmann, and must therefore be taken to be an ejectment suit. To finally decide and determine an ejectment suit as against all claim made therein, necessarily implies and must be taken to mean, to decide and determine that the party plaintiff, laying claim to the property in dispute, has no claim or title therein or thereto; in other words, the language thus employed means a trial and decision on the merits.

All doubt on the point is removed by the agreement, that a dismissal in a certain case shall be taken as a final decision. We find two conditions in appellant's contract under which the money was to be payable—a greater and a lesser one—the greater being that the money was only to be paid after a decision on the merits, the lesser that it was to be paid on a dismissal in a certain case.

The language of the agreement is, "but it is understood and agreed that a dismissal of said action of Rico is not to be considered a final decision in favor of Leese and wife, provided said Rico, his heirs or assigns, shall recommence a suit on the same subject matter on or before the eleventh day of April next." The respondents claim that because on August 13th, 1860, (that is, some months after April 11th, 1860,) the Rico suit was dismissed, therefore, by the very terms of the agreement, the \$14,000 became payable, no suit having been recommenced by Rico on or before April 11th, 1860. The appellant, on the other hand, contends that by the spirit of the entire contract, the only dismissal which was to have the effect of a final decision on the merits, was one to be entered on or before April 11th, 1860, and not otherwise, and that therefore he is not liable to pay: 1st. As to the letter of the agreement. By the very language as used, the dismissal is to precede, or take place before, the commencement of a new suit, and as the time is limited to April 11th, 1860, it necessarily and inevitably follows that the dismissal [156] must be on or before that day. But again, to "recommence a suit" absolutely implies that the previous one is at an end, and inasmuch as the provision is for a dismissal, to recommence a suit, in the meaning of the agreement, necessarily requires that the previous one is at an end

by reason of its having been dismissed. On authority the same result is attained. The law will not allow two or more suits to be pending, or to be brought, on the same subject matter. (*Groschen v. Lyon*, 16 Barb. 461.) It abhors multiplicity of actions. It will not, therefore, presume that parties intended by their agreement what it does not permit or sanction, and it will not therefore presume that the parties intended that there should be two suits outstanding on the same subject matter on behalf of Rico.

If the words of an agreement be susceptible of two senses, the one agreeable to, the other against law, the former shall be adopted. (*Archibald v. Thomas*, 3 Cow. 284.)

No matter what may have been the reason why the parties agreed that a dismissal before the day named should operate as a final decision, and that it only should so operate. It is their contract, and foolish or otherwise, as it may be thought to be, the Court can make no new contract for them, or extend the terms of the one they have entered into. (*Bensley v. Atwill*, 12 Cal. 231.) In *Hume v. Randall*, 1 Sim. & Stuk. 177, it is held, that where the intention is clearly and unequivocally expressed, every Court is bound by it, however capricious it may be, unless it be plainly controlled by other parts of the instrument.

2d. As to the spirit of the entire contract.

The covenant on the part of appellant, as the same is found set out in the agreement, is that "he will, without unreasonable delay—say not to exceed one month—comply with the conditions of a conveyance of the Sausal Rancho, made this day by said Leese and wife to him and one Richard Hellmann, by paying to said Leese the \$14,000 therein named as part of the purchase money unpaid."

Now by the terms and conditions of the deed from Leese and wife to appellant and Hellmann, the \$14,000 are only to be paid when (as we have already seen) a final decision should be given of the Rico suit on its merits in favor of Leese and wife. It is therefore clear, both from the deed and the agreement, that the appellant \*was to have his [157] title free and clear of the Rico suit before the respondents should be entitled to the balance of the purchase

money, and he has a right to demand that his title be so freed before he makes his final payment. This demand and right on the part of appellant is so just and equitable, that nothing short of a clear and unequivocal waiver of it by him should deprive him of it, and the Court will therefore look at all the surrounding circumstances in construing that which it is claimed is a waiver by him. The only waiver on his part is found in the lesser condition of the agreement. All contracts and deeds between vendor and vendee are to be most strongly construed against the vendor; the Court will therefore strictly interpret the lesser condition, by which a dismissal is to supersede the greater one, which requires a final decision on the merits. In *Chitty on Contracts*, \*80, it is said: "If by a particular construction the agreement of the party would be rendered frivolous or ineffectual, and the apparent object of the contract in reference to its subject matter would be frustrated, but a contrary exposition, though *per se* the less appropriate—looking to words only—would produce a different effect, the latter interpretation shall be applied to it, if it can possibly be supported by anything in the contract, or in the nature thereof." Taking the construction contended for by appellant, the Court would do justice to both parties; it would give a fair meaning to the lesser condition, and yet would not impair or invalidate the greater one.

Independently of the foregoing reasons, there is yet another very strong one why the Court should incline to the construction urged by appellant. By the agreement, Leese and wife covenant that they will faithfully defend the Rico suit at their own cost and expense with all proper and due care, diligence, and attention. This covenant by itself, but more especially when taken in connection with the terms of the deed—that the money should only be payable by appellant when a final decision should be rendered on the merits—must necessarily mean that they would defend the suit on its merits. Now the proof is, that on the thirteenth day of November, 1860, when the cause was called for trial, the respondents moved the Court to dismiss the action, on the ground that the complaint did not contain facts sufficient to constitute a cause of  
[158] action, for the \*express purpose of enabling them to

demand the \$14,000 of appellant, contrary to the true meaning and intent of the agreement and deed. This proof is found in the admission in the pleadings.

By the complaint the allegation of dismissal is not shown to have been on the motion of respondents. The motion for dismissal and the reason for it, are set up by the answer and are new matter, and not being denied by the replication, are therefore to be taken as true.

By this action of theirs, it is clear that Leese and wife have not complied with the terms of the covenant; they have not faithfully defended the Rico suit on its merits. It was their fault that a final decision was not made therein as against all claims of Rico; it was in their power to have had one, (had the facts supported their title,) and thus to have cleared the title of their vendees from the cloud and risk of the Rico claim. Instead of insisting on a trial on the merits, they insisted on a dismissal, and thus have thrown the whole burden of the Rico claim upon the appellant.

The finding by the Court below that the respondents 'had faithfully defended the Rico action, does not show that they had defended it to the extent herein claimed, but merely to the extent of the dismissal, and therefore does not in any manner estop the appellant in making his present claim.

II. Ashley and Sullivan should have been brought into the cause by the order of the Court below. The covenant in the respondents' deed was, that out of the \$14,000 there should be paid off the Sullivan mortgage. The covenant therefore was, that so much of that money as should be necessarys should be applied toward the payment of that mortgage.

In Ashley's case there was a clear assignment *pro tanto* of the debt. (*McEwen v. Johnson*, 7 Cal. 258.)

The appellant was not bound to pay his money in parcels as Leese might direct. He had a right to say that he would only make one payment, not several. He had covenanted to pay the \$14,000 in one round sum. The respondents were suing for that sum, and the Court had no right to say, as it did, you shall pay Leese \$13,000 and Ashley \$1,000, whenever he chooses to demand it or sue for it. A cause of action cannot be thus split up. The Court should have ordered

[159] them to be brought in. (Practice \*Act, sec. 17; *Weeks v. Lassen*, 5 Cal. 114; *Marks v. Marsh*, 9 Id. 96.)

*V. E. Howard* and *L. Aldrich*, for Respondents.

I. The parties to the contract contemplated the possibility of a dismissal of the Rico suit, and have agreed as to the effect of a dismissal, in the event that the same should occur and another suit, on the same subject matter, should be commenced on or before a certain date.

The eleventh day of April, 1860, is the day fixed on or before which a dismissal should not operate as a final judgment, provided said Rico should recommence a suit on the same subject matter on or before that day. The dismissal was, by the agreement of the parties, to be final, unless another suit on the same subject matter should be commenced on or before the date mentioned.

It is urged by the counsel for the appellant, in his brief on file, that the Court cannot make a contract for the parties. We admit the truth of his proposition, and ask the Court only to enforce the one that was made according to the intention of the parties.

The respondents were about to execute a deed to their ranch, by which they divested themselves altogether of their title to it; the payment of a large part of the purchase money was to await the final decision of the Rico suit. Both parties to the contract, it is presumed, knew that Rico might at any time before the submission of his suit, dismiss it either by motion in Court, or by a direction to the Clerk; they both knew that if the Rico suit should be dismissed, they had no power to compel him to bring another suit; under the circumstances, the result was a natural and fair one.

The respondents agreed that if the dismissal occurred on or before the eleventh day of April, 1860, it should not be considered a final decision if another suit should be commenced on the same subject matter by or before that time, and the appellant agreed to accept a dismissal as a final decision, provided another suit on the same subject matter should not be commenced by or before that date. The respondents did not wish to abandon all claim to their money, in the event of a dismissal by or before the date mentioned,

as they certainly might have done, if the reasoning of the counsel for the appellant be correct.

\*If there had been no stipulation with regard to [160] the effect of a dismissal, the dismissal at any time, whether another suit had been commenced or not, would have been regarded as a final decision of the Rico suit. (*Dowling v. Polack*, 18 Cal. 625.)

It is worthy of remark here, that the day fixed upon by the contracting parties as the one upon or before which the dismissal should not be regarded as a final decision, was the day immediately after the expiration of which the Statute of Limitations of 1855 was supposed to have become effectual as a defense to suits upon a certain class of land claims.

II. The counsel for the appellant has confounded the agreement of respondents to defend the Rico suit with an agreement to have the claim of Rico, whatever the same might have been, declared null and void by the Court. Respondents agreed faithfully to defend the Rico suit. They did not stipulate that they would not interpose a demurrer, nor that they would not move to dismiss, nor that they would not avail themselves of any legal means of defense to the Rico suit. They agreed, merely, faithfully to defend the Rico suit, and if it should be dismissed, and another suit should be commenced on or before the eleventh day of April, 1860, on the same subject matter, they should have no right to demand the \$14,000 by virtue of that dismissal.

The Court will observe that the dismissal in the Rico suit was upon the substantial ground, that the complaint did not state facts sufficient to constitute a cause of action. No suit could properly be brought on the same state of facts without being the subject of a similar motion. Could another suit, on a different state of facts, be regarded as a suit on the same subject matter, though it might be for the same object?

We believe that the parties to the contract, in the provision with regard to a dismissal and the commencement of another suit on or before the eleventh day of April, had reference themselves to a dismissal upon technical grounds, or a voluntary dismissal by Rico.

The faithfulness of a defense does not always depend upon the willingness of the defendant, or his attorney, to allow a

case to be passed upon on its merits, but frequently upon the opposite course. It might, with as much propriety [161] or correctness, be contended that \*the respondents, to comply with their agreement, should not have objected to illegal testimony that might have been offered by Rico on the trial of the suit, because such an objection might compel him to submit to a nonsuit, or to move for a dismissal.

It seems clear that the eleventh day of April was the day fixed on by the parties after which a dismissal should be considered a final judgment.

III. Neither the deed nor contract disclose the particular character of the Rico suit. It is mentioned as a suit for the recovery of a part of the property sold. The counsel for appellant says, in his brief, page 7, the suit "must therefore be taken to be an ejectment suit." He says further, same page: "To finally decide and determine an ejectment suit as against all claim made therein, necessarily implies and must be taken to mean, to decide and determine that the party plaintiff laying claim to the property in dispute, has no claim or title therein or thereto; in other words, the language thus employed means a trial and decision on the merits."

We agree with him, that the action brought by Rico must be taken to have been an action of ejectment, but we deny that a decision of that action in favor of respondents necessarily involved a decision that Rico had no title to the property in dispute. A judgment in ejectment is not conclusive of anything more than the right of the claimant to the possession of the land sued for, and the occupation of it by the defendant. (*Yount v. Howell*, 14 Cal. 468.)

The decision on the motion to dismiss, the ground having been that the complaint did not state facts sufficient to constitute a cause of action, was a decision of the suit upon its merits, so far as the right to bring another suit on the same state of facts was concerned. It was like the dismissal of a bill in equity for want of equity.

IV. The appellant claims that the contract has not been complied with in spirit, and that according to the true intention of the parties, at the time of making it, appellant was to have his title "free and clear of the Rico suit before the re-



spondents should be entitled to the balance of the purchase money."

We submit that we have shown that the respondents have done more than they were required to do under the contract. They \*have not only successfully defended [162] the Rico suit, but they have put it out of Rico's power to appeal from the judgment of dismissal by paying him to dismiss and abandon it.

If the appellant has any standing in Court, it must be upon a technical and rigid construction of the contract with regard to the time when the Rico suit was dismissed, and an utter disregard of the intention of the parties in making it.

How stand the parties to this suit in Court? The respondents, if they do not recover now, can never recover under the contract, because they cannot compel Rico to bring another suit, nor can they resuscitate the suit already dismissed.

The appellant is seeking to evade the payment of the money, not upon any allegation of trouble, either present or apprehended, from Rico; not because another suit has been brought by Rico, or threatened by him, but merely upon the alleged technical noncompliance of the respondents with the contract.

We submit that if intentions or equities are to govern, the appellant should meet with little favor.

V. The appellant claims that Ashley and Sullivan should have been made parties. If so, it was his duty to have moved to have them made parties before going to trial in the case. It was not the duty of the respondents to do it; they claimed no relief or judgment against Ashley or Sullivan. But why should either have been made parties? Ashley had an order for \$1,000 which this Court has held to be an assignment *pro tanto*, and he might sue on his own account. The respondents withdrew all claim to this portion of the \$14,000.

With regard to Sullivan, who had a mortgage on the premises, the deed provided that out of the \$14,000 the mortgage should be paid—that is, respondents in their deed covenanted that they would, out of the \$14,000, pay the Sullivan mortgage. The respondents were the persons to discharge the mortgage, and they could not do it without receiving the money from appellant. They sued him so that they might be able to discharge the mortgage. He does not fear any mis-

application of the money by respondents, nor does he even allege any reason for the ground he has taken with regard to the mortgage, but relies merely upon the technicalities of the law to protect him.

[163] \*Our positions with regard to the mortgage are, that we were the persons to discharge it; that the appellant relied on our covenant to do so, and was obliged to rely on that covenant, unless he charged us with an intention to misapply the money; that it was his duty to move the Court that Sullivan should be brought in, if it was necessary to bring him in; that he should have performed this duty, as he had ample opportunity to do, before the trial.

But the Court has provided against any complaint by appellant, by providing that the Sheriff who collects the money shall pay the same into Court, unless a discharge of the mortgage be first filed. The whole fund will be under the direction of the Court. If any one has a right to complain, the respondents have that right

NORTON, J. delivered the opinion of the Court—FIELD, C. J. and COPE, J. concurring.

By the terms of the deed, the \$14,000 were to be paid when the action of Rico should be finally decided in favor of the defendants (the plaintiffs in this action) as against all claims made by said Rico. The terms of the contract executed simultaneously with the deed are in effect the same. The stipulation is, not that all claim of Rico was to be finally adjudged, but that the particular action then pending should be finally decided. By the contract it is stipulated that a dismissal of the action should not be considered a final decision, provided a new suit for the same subject matter should be commenced by Rico on or before the eleventh day of April next thereafter. This stipulation cannot be construed as an agreement that a dismissal should in no event be deemed a final decision. The fact that the dismissal did not occur until after the time fixed for bringing a new action had no other effect than to render the stipulation as to a dismissal and a new action, nugatory under the circumstances. Perhaps it might be held, that this stipulation amounts to an agreement between the parties as to the sense in which they

employed the term "final decision," and that for the purposes of that transaction a dismissal of the action, if no new suit was brought, should be deemed a final decision, whatever might be the effect of those terms in other cases. But it is not necessary for the purposes of this case to give any such effect to the stipulation. \*A dismissal of [164] an action is a final decision of the action, and it is a final decision of *the action* as against all claim made by it, although it may not be a final determination of the rights of the parties as they may be presented in some other action. In the case of *Dowling v. Polack*, 18 Cal. 625, the Court say: "In effect a dismissal is a final judgment in favor of the defendants; and although it may not preclude the plaintiff from bringing a new suit, there is no doubt that for all purposes connected with the proceedings in the particular action, the rights of the parties are affected by it in the same manner as if there had been an adjudication upon the merits." The money became payable upon the dismissal of the action.

The complaint does not employ the same language as the contract; that is, instead of averring that the action had been finally decided, it sets forth the fact of dismissal. But, as we have seen, they are in effect the same, and so the finding of this fact by the Court determines the material issue in the case, and hence it is immaterial whether or not the fourth finding can be regarded.

Ashley was not a necessary party to this action. If the order in his favor, drawn by the plaintiff, J. P. Leese, on the defendant and Hellmann, operated as an assignment of so much of the debt, it made him their creditor for so much, but did not make him a joint owner of the whole debt.

Nor was Sullivan a necessary party. The provisions in the contract relative to his mortgage only amount to an agreement binding J. P. Leese, personally, to pay off that mortgage out of the money to be paid by the defendant. The provisions of the decree in relation to both Ashley and Sullivan are, to say the least, as beneficial to the defendant as the facts would authorize.

The judgment must be affirmed.

[165]

\*ADAMS v. WOODS *et al.*

<sup>1</sup> FUNDS IN HANDS OF RECEIVER—ORDER FOR DISTRIBUTION NOT APPEALABLE.—An order directing the receiver in an action to “distribute of the funds in his hands, under and in the order mentioned in the decree heretofore made in this cause, the sum of \$5,000 to the parties entitled to the same,” is not an appealable order.

<sup>1</sup> IDEM.—Such an order is not a special proceeding, within the purview of the first subdivision of section three hundred and thirty-six of the Practice Act, nor can it, when detached from the proceedings in an action, be treated as a final judgment from which an appeal may be taken.

IDEM.—If an order for the distribution of a sum of money by a receiver may in some cases be a final judgment, an appeal from it must present it as the final result of some proceeding, and the record must show what the proceeding is.

APPEAL from the Fourth Judicial District.

The facts are stated in the opinion.

*G. F. & W. H. Sharp*, for Appellants.

*T. W. Park*, for Respondent.

NORTON, J. delivered the opinion of the Court—CORE, J. concurring.

This is an appeal from an order directing the receiver to “distribute of the funds in his hands, under and in the order mentioned in the decree heretofore made in this cause, the sum of \$5,000 to the parties entitled to the same.” This order is not a special proceeding within the purview of the first subdivision of section three hundred and thirty-six of the Practice Act. It does not resemble the order made in this case reported in 18 Cal. 30, which was held to be a special proceeding, and not appurtenant to the main litigation, but appears to be only an interlocutory order in the progress of the action.

The document filed as the record on this appeal consists simply of an order, entitled in this action, upon the receiver to file his “final account,” then a brief account, filed by the receiver, called a “supplemental account,” and which consists only of a recital of what a referee had reported as to the receiver’s accounts, and a statement of certain offsets which

<sup>1</sup> Cited as authority in *Whitney v. Buckman*, 26 Cal. 454.

the receiver says the referee dis-allowed, but which [166] he claims, and then this order, from which the appeal is taken. We cannot see that these papers have any special connection, or that they constitute a record of any proceeding. A mere order like this, detached from the proceedings in an action, cannot be treated as a final judgment from which an appeal may be taken. If an order for the distribution of a sum of money by a receiver may in some cases be a final judgment, an appeal from it must present it as the final result of some proceeding, and the record must show what the proceeding is. In this case, the order is presented simply as an interlocutory order in another proceeding or action, and without any other portion of that proceeding or action. There is nothing in the papers before us by which it can appear whether the order is correct or erroneous. Presented in this form, it is not an appealable order or judgment.

The order, therefore, not being one for which a separate appeal is provided, the appeal must be dismissed.

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### MILIKEN *et al.* v. HUBER.

<sup>1</sup> CERTIORARI IN SUPREME COURT.—The Supreme Court cannot issue a writ of *certiorari* where its issuance would be the exercise of an original jurisdiction to superintend the proceedings of an inferior tribunal.

CERTIORARI IN DISTRICT COURT.—The general power of supervision over inferior tribunals which pertains to the Court of King's Bench in England pertains to the District Courts in this State.

CERTIORARI IN SUPREME COURT.—Nor can a writ of *certiorari* be issued by the Supreme Court where the act would be the exercise of appellate power, provided the review might have been had by an appeal, although the right of appeal is gone by the lapse of the time within which it was, by statute, required to be taken.

CERTIORARI, WHAT MAY BE REVIEWED ON.—*Sensible*, that no proceeding can be brought up for review by writ of *certiorari* from the Supreme Court, unless it be one properly the subject of an appeal but for which no right of appeal has been provided by law,

IDEM.—WHEN WRIT WILL NOT LIE.—H. against whom a judgment had been rendered in the District Court, after the lapse of more than one year thereafter applied

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<sup>1</sup> Cited as authority in *Bennett v. Wallace*, Jan. T. 1872 (not reported); *Caulfield v. Hudson*, 3 Cal. 390; *People v. Johnson*, 30 Cal. 101; *Winter v. Fitzpatrick*, 35 Cal. 269; *People v. County Judge*, 40 Cal. 479; *Matter of Eighth Street*, Id. 481; *People v. Elkins*, Id. 647; *Faut v. Mason*, 47 Cal. 8; *Spring Val. W. W. v. Bryant*, 52 Cal. 135; *Gross v. Cassin*, 43 Cal. 27. See 4 Or. 377.

to the Supreme Court for a writ of *certiorari* to the District Court by which the judgment might be brought up for review, alleging that the Court below had exceeded its jurisdiction by rendering the judgment against him without having obtained jurisdiction of his person: *Held*, that the case was not one in which the Court had power to issue the writ.

[167] \*CERTIORARI to the Sixth District Court.

The facts are stated in the opinion.

*H. H. Hartley*, for Plaintiff in error.

I. *Certiorari* is the proper remedy; the judgment of the Court below is attacked upon the ground that the Court never acquired jurisdiction of the person of the defendant, and that the judgment is void.

A void judgment not being subject to appeal can be set aside on *certiorari*. (24 Wend. 249; 6 Id. 465-564; 22 Id. 132; *Comstock v. Clemens*, 19 Cal. 77.)

II. The Court has power to grant a *certiorari* at any time; the limit of one year only applies to writs of error, and after one year they even may issue in special cases. The affidavit showed this to be a special case, and the action of the Court on granting the writ affirmed it to be so. (Vid. 27th rule of the Supreme Court.)

The control of Courts over judgments after one year does not apply to questions of right. (13 How. 46; 3 Denio, 257; 19 Wend. 108.)

*Hopkins & Hermance*, for Defendant in error.

The writ was improperly issued. We admit that this Court has full power to issue this writ when necessary to the complete exercise of its appellate jurisdiction as conferred by the Constitution, and whenever this writ is necessary in aid of that appellate power it will lie. But we deny that it is in the power of the Legislature to confer original jurisdiction upon this Court to exercise any such authority over the inferior tribunals of this State as is contended for by appellant.

If this Court has no appellate jurisdiction in the matter of the judgment in this case, or if, by reason of some existing facts appearing upon the record, this judgment has by force of statute become final and no longer a subject of appellate

review, then the right to review it must rest upon some original jurisdiction in this Court, and not upon appellate power.

\*But this Court has held, in a number of cases, [168] that it has no original jurisdiction for any purpose, except as a conservator of the peace and to issue writs of *habeas corpus*. (*Ex parte Attorney-General*, 1 Cal. 86; *People v. Shear*, 7 Id. 140.)

The writ of *certiorari* is only allowed by this Court to aid in its appellate power of review of all that class of cases placed under its jurisdiction by the Constitution. It is but one of the modes of appeal allowed to a party where the statute has failed to provide any other remedy. "A judgment may be reviewed as prescribed by this title, and not otherwise"—meaning review by appellate power. (Wood's Dig. art. 1067, p. 209.)

And art. 1070 of that title provides, that the appeal must be taken within one year after the judgment.

The right of review by appeal in that class of cases named in the Constitution, exists independent of any legislative authority, and all the writs and process known to the common law may be resorted to when necessary to the complete exercise of that right; and when in any case it is found that the Legislature has failed to provide a means by which a party may avail himself of the benefit of the appellate power or appellate supervision of this Court, then, and in that case, this or any other writ known to the common law, necessary to secure that end, would lie.

If, then, the Constitution confers upon this Court power to review on an appeal, and in the manner stated, certain classes of cases, can the Legislature fix a limit to the time in which, and the mode by which, that review shall take place? That this power exists is clearly decided in *Haight v. Gay*, 8 Cal. 300.

It is there held, that after a party has failed to avail himself of his remedy of review provided by the statute until the judgment becomes final by lapse of time, error will not lie.

If, then, error will not, neither will *certiorari*; for by the Constitution this Court is only clothed with authority "to issue all writs and process necessary to the exercise of its

appellate power," and which, being general in its terms, includes *certiorari*, *mandamus*, etc., as well as writs of error.

This Court has repeatedly held, that all the writs and process known to the common law could be issued by the [169] Court when necessary in aid of its appellate jurisdiction conferred by the Constitution, and that neither *quo warranto*, *certiorari*, or error, would lie, unless necessary in aid of that power. Nor would any other process lie, for this Court has none but appellate power, and power to aid them in the exercise of the same. (*People v. District Court*, 9 Cal. 21; *White v. Lighthall*, 1 Id. 348; *People v. Turner*, Id. 145; *Ex rel. Field v. Turner*, Id. 152; *Parcell v. McKinne*, 14 Id. 38; *Ex parte Attorney-General*, 1 Id. 86.)

NORTON, J. delivered the opinion of the Court—COPE, J. concurring.

The plaintiffs having obtained a judgment in the District Court for Sacramento county, and more than one year having elapsed, the defendant, on a representation that the District Court had exceeded its jurisdiction by rendering a judgment against him without having acquired jurisdiction of his person, and that the time allowed by statute for an appeal had expired, procured a writ of *certiorari* to be issued from this Court to bring up the judgment for review. A motion is now made to dismiss the writ, on the ground that this Court has no jurisdiction to issue it for such a purpose.

This Court has only appellate jurisdiction, and is only authorized to issue the writ of *certiorari* in aid of such jurisdiction. (*Ex parte Attorney-General*, 1 Cal. 85; *The People v. Shear*, 7 Id. 139.) If this Court had jurisdiction to review the judgment on an appeal taken within one year after it was rendered, that jurisdiction was lost after the expiration of the year. (*Haight v. Gay*, 8 Cal. 297.) The general power of supervision over inferior tribunals which pertains to the Court of King's Bench in England, pertains to the District Court in this State. The provisions of section four hundred and fifty-six of the Civil Practice Act, that the writ of *certiorari* may be granted by any Court, etc., must be held to mean any Court of original jurisdiction. The Legislature could not, under the Constitution, confer such power upon



this Court. Besides, by the terms of this section of the Practice Act, the writ of *certiorari* cannot issue in cases where there is an appeal. If there was an appeal in this case, the limitation by statute of the right to bring that appeal within one year does not make it, after a \*year [170] has been suffered to elapse without taking an appeal, a case in which there was no appeal. In any view of the case, therefore, the writ was improperly issued. If it was the exercise of an original jurisdiction to superintend the proceedings of inferior tribunals, it was the exercise of a power which does not belong to this Court. If it was the exercise of an appellate jurisdiction, it could not be done by the proceeding of a writ of *certiorari* after the time to exercise the right of appeal had elapsed.

An order must be entered dismissing the writ.

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### CARLTON v. CONROY *et al*

**MONEY DEPOSITED BY SHERIFF LOSES ITS IDENTITY.**—Where a Sheriff deposits, in his own name, with his banker money received from a sale by him under judicial process, its identity is lost, and it cannot be followed as a specific fund by the parties entitled to the proceeds of the sale into the hands of a third person who has drawn it from the banker upon the Sheriff's order.

**APPEAL** from the Twelfth Judicial District.

The facts are stated in the opinion

*E. Cook*, for Appellant.

*Cyril V. Grey*, for Respondents,

NORTON, J. delivered the opinion of the Court—FIELD, O. J. concurring.

The facts in this case which will determine our judgment are, in substance, as follows: The Sheriff of San Francisco county, D. Scannell, under various attachments and executions, sold certain property of the firm of Gladwin, Hugg &

Co. The sale was conducted by Cobb as auctioneer, and he deposited the proceeds, as was his custom on other sales made for the Sheriff, with his banker promiscuously with his other money, and not specially as money belonging to the Sheriff. A controversy arose among the attaching creditors as to the application of the proceeds of that sale—  
[171] and, \*pending this, for the accommodation of one of them, McKenty, the Sheriff, deposited about \$3,000 with Coghill & Co., and took from them a promissory note for the amount, payable on demand. The money was paid to Coghill & Co. by means of a check drawn by the Sheriff on Cobb, who at the time had no other funds of the Sheriff in his hands except the proceeds of said sale. Sometime after this, the Sheriff had collected some money on an execution in favor of Conroy & O'Connor, and being called upon for it by their attorney, he indorsed and delivered to the attorney the promissory note of Coghill & Co. as security for a few days, and ultimately with the right to receive upon it the amount of money due to Conroy & O'Connor. The note did not specify the money as belonging to any particular fund, nor did it run to the Sheriff as such, but was simply a note to D. Scannell or order. Conroy & O'Connor, through their attorney, in pursuance of the authority from the Sheriff, received from Coghill & Co. the money on the note, and now hold it in satisfaction of the amount collected by the Sheriff on their execution. All these transactions, except the indorsement of the note, were made for the Sheriff by Harrison, his under Sheriff.

Carlton, the plaintiff in this action, having become the assignee in the bankruptcy of Gladwin, Hugg & Co., brings this action, claiming that the money received by Conroy & O'Connor on the note of Coghill & Co. is a part of the assets of his assignors, which the Sheriff had no right to pay in satisfaction of demands due by him to other persons, and that Conroy & O'Connor, under the circumstances, having received it for a past debt, and not upon any new consideration, may be treated as trustees for the plaintiff in this action.

Without considering the other objections that are raised to the right of Carlton to maintain this action, we are satisfied

that the money in question in the hands of Conroy & O'Connor cannot be considered as a part of the assets of Gladwin, Hugg & Co. The sale divested Gladwin, Hugg & Co. of their title to the particular property, and although the Sheriff and his bondsmen might be liable to pay them the amount of any surplus of the proceeds that might remain after paying the creditors under whose process the property was sold, neither they, nor indeed the creditors, had any \*title [172] to the identical money that was paid on the sale.

(*Turner v. Fendall*, 1 Cranch, 116.) By depositing the money with Coghill & Co., the Sheriff did not pay it to McKenty or any other claimant. He simply loaned to Coghill & Co., at the request of McKenty, so much money, taking care to preserve his control of it by taking a note to himself in his private capacity. Upon its being repaid to him, he paid the money due to Conroy & O'Connor. This is not a question as to the application of a fund in the Sheriff's hands, but simply whether a payment of money by a Sheriff to an execution creditor can be defeated by showing, from an examination of the Sheriff's accounts with his banker, or other person with whom he deposited the proceeds of sales, that he would not have had funds to make the payment in question, at the time he drew his check for it, if he had not had on deposit the proceeds of a sale in some other case. A right thus to search out and hold the proceeds of a sale, and to defeat payments by a Sheriff made under such circumstances, would occasion almost insuperable difficulties in the administration of the office of Sheriff, and we can see no principle upon which it can be sustained.

Judgment affirmed.

## BAUM v. GRIGSBY.

<sup>1</sup> **VENDOR'S LIEN NOT ASSIGNABLE.**—The equitable lien which a vendor of real estate, after an absolute conveyance, retains upon the property for the unpaid purchase money is not assignable.

<sup>1</sup> **IDEM.**—This lien is not a specific absolute charge upon the property, but merely a personal privilege of the vendor, and does not pass by a transfer of his claim for the purchase money.

<sup>2</sup> **VENDOR'S LIEN, HOW WAIVED.**—The lien of the vendor is not waived, in the absence of express agreement to that effect, by the taking of the note or other personal security of the vendee for the purchase money; but is waived by the taking of a distinct and independent security, unless there is at the time an express agreement for its retention.

**VENDOR'S LIEN, HOW DISTINGUISHED.**—The distinction between the lien of a vendor after absolute conveyance and the lien of a vendor when the contract of sale is unexecuted, stated. In the latter case, the vendor holds the legal estate as security for the purchase money, and can assign his contract with the conveyance of the title, and in that event his assignee acquires the same rights and is subject to the same liabilities as himself. In the former case, the vendor retains a mere equity, which, to become of any force or effect, must be established by the decree of the Court.

[173] \***APPEAL** from the Seventh Judicial District.

One R. M. Hill sold and by a deed, absolute in form, conveyed to the defendant a tract of land in Napa County, and in part payment of the purchase money, defendant executed to Hill his negotiable promissory note. Hill indorsed the note to plaintiff, who brought this action to recover the amount due upon it, and also to establish a vendor's lien upon the premises, and to subject them to sale for the satisfaction of the debt.

The District Court gave judgment for the plaintiff, and directed a sale of the premises, and that the proceeds be applied to the payment of the amount due on the note. From this judgment the defendant appeals.

*W. C. Wallace and T. J. Tucker, for Appellant.*

The plaintiff claims that the sale and indorsement of the

<sup>1</sup> Affirmed in *Lewis v. Covillaud*, post 189; *Williams v. Young*, post 228; cited and commented on in *Porter v. Brooks*, 35 Cal. 204; cited as authority in *Ross v. Heintzen*, 36 Cal. 321.

<sup>2</sup> As to waiver of lien, approved in *Robles v. Clark*, 25 Cal. 328. Enforcement of lien, approved in *Camden v. Vail*, 23 Cal. 636; *Hill v. Grigsby*, 32 Cal. 59. See *Pell v. McElroy*, 36 Cal. 268, and cases cited; *Wells v. Harter*, 56 Cal. 844. See 10 B. I. 339; 4 Bush, 126; 10 Kan. 414.

negotiable note, given in part payment of the purchase money, necessarily carries with it a lien upon the land.

There is not one authority to support this doctrine; but there is a conflict of authorities as to whether a vendor's lien can, under any circumstances, be sold and assigned to a third person.

This silent lien of a vendor is not an absolute and specific charge upon the land, but is a mere equitable right, arising from an implied trust relation, which may be resorted to by the vendor. (*Sparks v. Hess*, 15 Cal. 193.)

In this case the Court say: "It is a right founded upon the natural justice of allowing the vendor to subject the property with which he has parted to the satisfaction of the debt which constitutes the consideration of the transfer." And it is further held in *Hunt v. Waterman*, 12 Cal. 304, that "The silent lien of the vendor is extinguished when the vendor manifests an intention to abandon, or not to look to it."

In the case of *Halleck v. Smith*, 3 Barb. 272, the Court held, that "If the vendor take a note or bond from the vendee for the purchase money, that is no waiver of the lien—for such instruments are only the ordinary evidences of the debt. But if the note or bond is assigned or transferred to a third person for his \*benefit, the security is gone forever. [174] The reason is, that there is no peculiar equity in favor of the third person." This case is directly in point. (See also *White v. Williams*, 1 Paige, 506; *Jackman v. Hallock et al.*, 1 Ohio, 320; *Leman v. Beam*, 2 Id. 383; *Brush et al. v. Kensley et al.*, 14 Id. 22; *Green et al. v. Demoss et al.*, 10 Humph. 372; *Gilmore v. Brown et al.*, 1 Mason, 218.)

*Hartson & Stoney*, for Respondent.

If the lien for the purchase money is a mere personal right of the vendor, the respondent being the assignee of the vendor must of course fail. But if, as some of the authorities say, "the purchase money is a lien on the land," (*Gilman v. Brown*, 1 Mason, 212,) it would seem that, as in the case of a mortgage the assignment of the debt by parol draws the land after it as a consequence, so in this case, the assignment of the debt due for the purchase money should, upon the same principle, draw after it the land upon which "the purchase money was

a lien." (*Johnson v. Hart*, 3 Johns. Cases, 329; *McMillan v. Richards*, 9 Cal. 411; *Phelan v. Olney*, 6 Id. 483; *Bennett v. Solomon*, 6 Id. 138.)

Hilliard, in his work on mortgages, (Vol. 1, pp. 463, 464,) says: "One of the most common occasions for executing a mortgage occurs when a conveyance of land is made and a mortgage of the same land at the same time taken back by the grantor to secure the whole or a part of the purchase money. The lien for the purchase money is a title substantially corresponding with that created by such a mortgage, but arising by implication merely, and not depending upon any deed or written instrument whatever."

The ground of these equitable liens is, that the vendee ought not in equity to be allowed to hold the land, the purchase money for which he is unwilling to pay. In *Chapman v. Tanner*, 1 Vern. 267, the Lord Keeper said: "In this case there is a natural equity that the land should stand charged with so much of the purchase money as was not paid, and that, without any special agreement for that purpose."

We cannot perceive that the equity is at all changed by the fact that the unpaid purchase money is due to the assignee of the vendor instead of the vendor himself; or how it [175] can be equitable to hold \*the land without paying the purchase money in the one case and not in the other. (See *Fisher et al. v. Johnson & Wife*, 5 Ind. [Porter] 492; *Dart v. McQuilty et al.*, 6 Id. 391; *Blumfield et al. v. Palmer*, 6 Blackf. 227; *Bryer et al. v. Chase*, 8 Id. 508; 1 Hilliard on Mort. 477, 482, 485. 486; *Eskidge v. McClure et al.*, 2 Yerg. 84; *Watson v. Willard*, 9 Barr. 89; *Honore's Ex'rs v. Bakeville*, 6 B. Monroe, 67; *Kelly v. Payne*, 18 Ala. 371; *White v. Stover*, 10 Id. 441; *Skinner v. Scott*, 6 Dana, 138.)

FIELD, C. J., delivered the opinion of the Court—NORTON, J. concurring.

The doctrine that a vendor of real property, after an absolute conveyance, retains an equitable lien for the unpaid purchase money, prevails in England and in nearly all the States of the Union. The difference of opinion in the numerous cases upon the subject in the Courts of this country relates principally to the character of the lien, and to the question

whether it passes with a transfer of the claim of the vendor for the purchase money. The lien, it is conceded, is not waived, in the absence of express agreement to that effect, by the fact that the vendor takes the note or other personal security of the vendee for the money. Such personal security is considered as only intended to meet and overcome the acknowledgment of the receipt of the money in the deed. On the other hand, when any other independent security is taken—as a mortgage on the land, or upon other property, or the personal responsibility of a third person—the lien is held to be waived, unless there is at the time an express agreement for its retention. The taking of a distinct, independent security is presumptive evidence of the waiver.

The fact, therefore, that the vendee in the present case gave his negotiable promissory note to the vendor for a portion of the purchase money, in no respect affects the equitable lien of the latter. The question presented is, whether that lien passed to the plaintiff with the indorsement of the note to him. There was no attempt made to assign specially the lien: its assignment is asserted from the simple transfer of the note.

The question, upon the authorities, is clearly with the appellant. \*Indeed, with the exception of de- [176] cisions in two or three States, the adjudged cases are uniformly against any assignment of the lien by a transfer of the note or other personal security of the vendee. "I am not aware of any case," says Chancellor Walworth, "where the assignee of the note or the security has been permitted to sustain such a claim on an implied agreement to assign the lien." (*White v. Williams*, 1 Paige, 506.) "I do not find in the English books," says Mr. Justice Nesbit, of the Supreme Court of Georgia, "a single case in which it (the lien) has been enforced in favor of the assignee of the note for the purchase money." (*Wellborn v. Williams*, 9 Geo. 89.)

The cases which deny that the lien passes with the personal security of the vendee do not rest, except in a few instances, upon the want of a special assignment from the vendor, but upon the ground that the lien is in its nature unassignable; and to that conclusion we have arrived. The lien is not a specific, absolute charge upon the property. It is simply a

right to resort to the property upon a failure of payment by the vendee. It does not arise from any agreement of the parties, but is the creature of equity, and is established solely for the security of the vendor. It is founded upon the natural justice of allowing a party to reach the property, which he has transferred, to satisfy the debt which constitutes the consideration of the transfer. It is, therefore, the personal privilege of the vendor. The assignee of a note given for the purchase money stands in a very different position. He has not parted with the property which he seeks to reach, in consideration of the note he has received. He has never held the property, and has, therefore, no special claims upon equity to subject it to sale for his benefit. The particular equity of the vendor in this respect cannot, in the nature of things, be asserted by another. "It is indispensably necessary," says Chancellor Bland, "to the existence of such a lien, that the parties should stand in the relation towards each other of *vendor* and *vendee* of real estate, the purchase money of which has not been fully paid. If that relationship is, in any manner whatever, put off, altered, or relinquished, an equitable lien either cannot arise or will be destroyed. The pure relationship of creditor and debtor, [177] or of borrower and lender, is incompatible with \*the existence of an equitable lien, excludes or extinguishes it." And again: "An equitable lien is an incumbrance upon land, which can only be held by a vendor; and although assets may be marshaled so as to put a vendor altogether upon his equitable lien, for the benefit of other creditors, yet no third person can, as assignee of the vendor, derive any benefit from such a lien; nor can it, like a bond or mortgage, be assigned, because it is not expressed in writing, or in any separate contract, but exists only as an inseparable equitable incident of the contract of purchase, and is raised by construction of equity in favor of the vendor only. To allow it to pass by an assignment of the claim for the purchase money, or by a transfer of the bonds, or notes, given as a security for the payment of the purchase money, would be of the most ruinous consequence to titles to real estate." (1 Bland's Chan. 523, 524.) The vendor's lien, says the Supreme Court of Tennessee, "is nothing more than a



mere equity, capable of acquiring the force and efficacy of a lien, under certain circumstances, in the event of the non-payment of the purchase money. It is the creature of a Court of Equity, and rests upon the principle, 'that a person having got the estate of another shall not, as between them, keep it and not pay the consideration.' (*Mackreth v. Symmons*, 15 Ves. 329.) But this lien is a mere personal equitable right in the vendor, and is not assignable. It looks only to the security of the vendor, and does not pass to the assignee of the vendee's obligation for the consideration money, and, consequently, cannot be enforced in his favor." (*Green v. Demoss*, 10 Humph. 374; see also *Jackman v. Hallock*, 1 Ohio, 320; *Wellborn v. Williams*, 9 Geo. 86; *Briggs v. Hill*, 6 How. 362; *Gilman v. Brown*, 1 Mason, 221; and the note of Hare & Wallace to *Mackreth v. Symmons*, 2 Leading Cases in Equity, 276, where all the authorities are cited.)

There is a marked distinction between the lien of a vendor after absolute conveyance and the lien of a vendor where the contract of sale is unexecuted. In the latter case, the vendor holds the legal estate as security for the purchase money. He can assign his contract with the conveyance of the title; and in such case his assignee will acquire the same rights and be subject to the same liabilities as himself. (See *Sparks v. Hess*, 15 Cal. 194; and *Taylor v. \*McKinney*, 20 Id. [178] 618.) In the former case, the vendor retains a mere equity, which to become of any force or effect must be established by the decree of the Court.

It follows that the District Court erred in directing the enforcement of the lien of the vendor in favor of the plaintiff. The judgment must be reversed, and the Court below directed to enter upon its findings a simple money judgment against the defendant for the amount due upon the note, and to deny the prayer for the sale of the premises.

Ordered accordingly.

LEWIS v. COVILLAUD *et al.*

**DEED, CONSIDERATION IN.**—In a deed of land the consideration was expressed to be \$10,000, \$4,000 paid in cash, "and the balance by the assuming, on the part of the said grantees, the payment of a certain mortgage" then existing upon the property to secure the grantor's note for \$6,000: *Held*, that this recital, unless controlled by evidence of a contrary intention, showed an agreement on the part of the grantees to pay the mortgage debt, and not merely to obtain a discharge of the mortgage as a lien upon the property.

**AGREEMENT TO PAY DEBT.**—Where A owes B, and the latter owes C, and A and B, without consulting C, agree that the former shall pay to C what he is owing to B, an action cannot be maintained by C against A for want of privity. *McLarren v. Hutchinson*, 18 Cal. 80, commented on and questioned.

**VENDOR'S LIEN NOT ASSIGNABLE.**—A vendor's lien is not assignable. *Baum v. Grigsby*, ante 172, affirmed on this point.

**FINDING NOT DISTURBED WHERE EVIDENCE CONFLICTS.**—A finding of fact by the lower Court will not be disturbed by the appellate Court when the evidence is conflicting, or where the conclusion drawn from it is not necessarily erroneous in point of law.

**ACCORD AND SATISFACTION.**—Thus, where C. purchased a city lot of B., and as part of the consideration assumed the payment of a note from B. to L., secured by mortgage upon the property, and some time afterwards C. and L. entered into an arrangement by which C. executed his notes to L. for about three-fourths of the amount due on the original note, and to secure these latter notes gave a new mortgage upon the property, and L. thereupon delivered up the old mortgage, but not the note, and indorsed upon the record entry of the mortgage, "Satisfied by being released:" *Held*, that whether this was an accord and satisfaction of the whole debt, depended upon the intention of the parties, and that the Court below having, upon conflicting evidence in this respect, found as a fact that full satisfaction was not intended, its finding would not be disturbed, although the appellate Court might be of opinion that the weight of evidence was against the finding.

[179] \*APPEAL from the Tenth Judicial District.

On the fourth day of September, 1850, S. J. Field conveyed by deed to Joel Burlingame, a lot, with the improvements thereon, in the city of Marysville. On the seventh day of August, 1855, Burlingame executed a mortgage upon the premises to J. E. N. Lewis, the plaintiff, to secure a note in form as follows:

"\$6,000. Twenty-four calendar months from date, for value received, (loaned money,) I promise to pay to Joseph E. N. Lewis, or order, six thousand dollars, with the following monthly interest: for the first twelve months, two and one-half per cent. per month; for the balance of the time until

<sup>1</sup> Questioned, *Sacramento L. Co. v. Wagner*, 67 Cal. 295.

<sup>2</sup> Cited as authority in *Englund v. Lewis*, 25 Cal. 346; *Ross v. Heintzen*, 36 Cal. 321. See *Williams v. Young*, post, 227. See 26 Ark. 393, 645.

paid, two per cent. per month. Interest to be paid monthly, and in default of such payment the same shall be added to the principal, and draw the same interest as principal. August seventh, A. D. one thousand eight hundred and fifty-five.

JOEL BURLINGAME."

Which mortgage was duly acknowledged and recorded.

On the twenty-first day of September, 1855, Joel Burlingame and his wife, Freelove Burlingame, executed to the defendants, Charles Covillaud and M. C. Nye, a warrantee deed of which the consideration clause is as follows: "In consideration of the sum of \$10,000, received to their full satisfaction of Charles Covillaud and M. C. Nye, both of the same county and State aforesaid, grantees, to be paid as follows: \$4,000 in cash down, and the balance by the assuming, on the part of the said grantees, the payment of a certain mortgage upon the property hereinafter described, made by the above described Joel Burlingame on the seventh day of August, one thousand eight hundred and fifty-five, in favor of one J. E. N. Lewis for the sum of \$6,000." This deed contained no covenants on the part of the grantees, and no other recitals in reference to the consideration than the clause above set forth. The deed was duly acknowledged and recorded, and the \$4,000 paid by the grantees. The first month's interest, which fell due after the making of this deed upon the \$6,000 note of Lewis, was paid to Lewis by Covillaud, and no further payments were made by any one until in 1858, as hereafter stated. Oct. 8th, 1855, Nye by deed conveyed all his interest in the property to Covillaud, subject to the mortgage. \*On the twenty-fifth day of September, [180] 1857, Covillaud and Lewis entered into an arrangement for the release of the latter's mortgage, in pursuance of which Covillaud executed to Lewis two notes for \$4,000 each, one payable in twelve, and the other twenty-four months from date, and both secured by a mortgage executed by C. upon the property; on the reception of which Lewis delivered to Covillaud the original mortgage from Burlingame, and indorsed upon the record of it a satisfaction in these words: "Satisfied by being released; Sept. 26th, 1855. Jos. E. N. Lewis." At the date of this transaction the amount due on

the original note, principal and interest, was \$10,312. This note was not delivered to Covillaud with the mortgage, but remained in possession of Lewis, who at some time afterwards (when does not appear) indorsed upon it as a credit the \$8,000 paid by the notes of C. One of the \$4,000 notes was paid by C. at maturity, and the other was not due when this suit was commenced, but appears also to have been since paid according to its terms.

On the twenty-seventh of March, 1858, Lewis commenced an action against Burlingame to recover the balance due upon the \$6,000 note, after deducting as a payment the \$8,000 for which Covillaud had given his notes. Burlingame made default, and on the twelfth of February, 1859, judgment was rendered against him in favor of the plaintiff for \$3,205, to bear interest at the rate of two per cent. per month. No portion of this judgment has been paid.

On the twenty-second day of October, 1858, Joel Burlingame executed to Lewis an instrument in which, after reciting that Nye and Covillaud had neglected to comply with their agreement to pay off the \$6,000 note, he, in consideration of one dollar, conveys to Lewis all his interest and rights in law or equity to the lot in question, and continues, "together with any and all right of action in law or equity against said Covillaud and Nye to enforce a specific performance of the contract of sale and purchase on their part, for the payment of said mortgage, according to their agreement with the undersigned, at the time that the writing was signed by the undersigned and Freelove Burlingame, his wife, for the property covered by said mortgage, and was delivered, [181] thus executed, to the \*said Covillaud and Nye, (the undersigned wife neither then nor at any other time having any interest in said property,) and the said Lewis is hereby authorized and empowered in my name to institute any and all suits in law or equity against any and all persons as fully and completely as I myself could, had not this conveyance been given for his use and benefit, that may be necessary and proper to secure and recover the matters and things herein referred to, or that may be necessary or proper in carrying out the objects of this conveyance in securing

the payment of said note and mortgage in full, and to the end that all moneys arising therefrom shall be applied in payment on said note and mortgage."

The present action was commenced on the twenty-first of March, 1859, by Lewis against Covillaud and Nye. The complaint sets forth substantially the facts above stated, and avers that at the time of the purchase by defendants of Burlingame they, as part of the consideration, assumed the payment of the note in favor of Lewis, and that such was the intention and effect of the consideration clause in the mortgage; and further avers, that the \$8,000 paid by Covillaud in 1858 was for the purpose of obtaining a release of the mortgage, and was not, nor intended to be, a satisfaction of the debt; that plaintiff is entitled to recover the balance not paid upon the note, both by reason of the agreement on the part of defendants at the time of their purchase to pay the debt to plaintiff, and also by virtue of the assignment from Burlingame to plaintiff, and that under this assignment he is also entitled to enforce against the property the vendor's lien which existed in favor of Burlingame, and prays judgment accordingly.

The answer admits the execution of the several instruments, as alleged by plaintiff, but denies that defendants in their purchase from Burlingame agreed to assume the payment of the \$6,000 note, or that such was the intention, or the effect of the recitals in the deed executed to them, and avers that their agreement in this respect only extended to procuring a satisfaction of the Lewis mortgage. It also avers that the transaction between plaintiff and defendants in 1858 was intended to be and was a full satisfaction of the original debt and note.

The case was tried by the Court without a jury. The plaintiff \*called as a witness one Taylor, who [182] testified that at the time Burlingame sold to defendants, witness had in his possession, as agent for Lewis, the latter's note against Burlingame; that Covillaud paid the month's interest upon it which fell due first after the purchase, and that when the second month's interest fell due he spoke to Covillaud about it, and C. said, that although he knew it was drawing compound interest, he preferred to let it

run for a while as he was paying still higher rates of interest to other parties.

On behalf of defendants, W. W. Lawton testified, that at the request of the parties he drew the notes and mortgage from Covillaud to plaintiff in 1858, and also went with them to the Recorder's office, and was present when the satisfaction of the original mortgage was signed, and that he delivered that mortgage to defendants at request of Lewis; that during these transactions he heard a good deal of conversation between the parties about the matter; that he could not now recollect anything that was said, but that from all the talk it was his impression that the parties intended a settlement of all claims of Lewis against Covillaud, but that he did not understand or suppose at the time that plaintiff intended to release Burlingame from the payment of the balance of the note. Witness further stated, in answer to interrogatories by plaintiff, that it was probable (although his recollection was indistinct) that the original note and mortgage of Burlingame were attached together, and that when the mortgage was given up to Covillaud the note was torn from it and retained by Lewis.

The Court found as a fact, among others, that Covillaud and Nye, at the time of their purchase from Burlingame, assumed to pay the mortgage debt to plaintiff, and also that the transaction between plaintiff and Covillaud in 1857 did not amount to an accord and satisfaction of the entire debt. A judgment was rendered in favor of plaintiff for \$4,160, being the amount of principal and interest due, after deducting the payments, upon the note made by Burlingame to plaintiff; and also decreed that plaintiff had a vendor's lien upon the property by virtue of his assignment from Burlingame, and that this lien should be enforced. Defendants moved for a new trial, which was denied, and from this order and the judgment they appeal.

[183]     \**Mesick & Swezey*, for Appellants.

I. The recital in the deed from Burlingame to defendants, that the grantees are to assume the mortgage, is not binding on them as forming no part of the conveyance. (16 Johns. 49; 4 Cow. 429.) If there is any liability arising from such

recital, no action can be maintained thereon except by the grantors. (*Brown v. Hunter*, 14 Cal. 31; *McLaren v. Hutchinson*, 18 Id. 80.) Such action could not be maintained by Burlingame and wife until they had paid the mortgage. (14 Barb. 201; 9 Paige's Ch. 446.)

It is, if binding at all, a bare equitable obligation subjecting the land to the payment of the mortgage. (3 Johns. 261, and cases; 2 Brown Ch. 88.) It may be enforced by the mortgagee by a foreclosure of the mortgage in equity, and not otherwise. (2 Sand. Ch. 498; 2 Denio, 595; 2 Brown's Ch. 88; 9 Paige's Ch. 432; 16 How. Prac. 430.)

Here the mortgagee has released the premises. Can he then proceed against the defendants as such grantees?

As to Burlingame the clause in the deed can only operate as a covenant of indemnity, and as such he cannot sue thereon until he has paid the claim. (14 Barb. 201; 9 Paige, 446; 2 Barb. 16.) Covillaud upon purchasing of Nye became solely liable. (10 Paige, 595-597; 2 Denio, 595.)

II. The settlement of defendant Covillaud with plaintiff was a full discharge and accord and satisfaction of all his and Nye's liabilities to plaintiff under the deed from Burlingame to Covillaud. (2 Pars. on Cont. 193, 200, 139, and note\*; 6 Humph. 85; 3 Denio, 410; 7 Cow. 223; 14 Wend. 116.)

The accord and satisfaction was complete even if the full amount of interest was not included. (5 Johns. 268.) The delivery up to Covillaud of the mortgage is of itself a release and discharge. The question is, whether the terms of this agreement are to be extended to the mortgage debt assumed by Covillaud and Nye, or restricted to the mortgage itself as an incumbrance upon the property? It is certainly fair to assume that if an agreement on the part of defendants with the Burlingames to pay the mortgage is an agreement on their part to pay the mortgage debt, then an agreement on the part of Lewis to satisfy this mortgage is [184] an agreement to satisfy the mortgage debt. Moreover, from the character of the transaction itself Covillaud must have understood that he was discharging, by his notes and mortgage, the obligation which he and Nye had assumed in respect to the Burlingame mortgage by the recitals in the deed to them.

The witness Lawton so understood it, and the discharge by Lewis written upon the mortgage, and the record "satisfied by being released," means the same thing. The word "satisfied" can only apply to the mortgage and not to the property. If he "satisfied" the mortgage, then the mortgage debt was satisfied. The words "by being released" must refer to the mortgage as much as does the word "satisfied" and not to the property. And as the defendants' assumption only extended by its terms to the payment of the mortgage and embraced the mortgage debt only by construction, so by the mortgage being released the release of the mortgage debt was effected. This discharge is simply a satisfaction of the mortgage, and the use of the words "by being released" cannot qualify the effect of the word "satisfied," and they signify nothing in the connection, unless a special release had been executed by Lewis of the premises from the mortgage or of the mortgage debt, which was not done. The release, then, was the result of the satisfaction, and the satisfaction not the result of the release.

The correctness of our theory is not affected by the fact that the Burlingame note was found in the possession of Lewis after the transaction of the twenty-fifth and twenty-sixth of September, 1857. There is no evidence that Covillaud knew of its retention by Lewis; none that by the terms of the arrangement Lewis was to retain it. There was evidence that the note had been pasted on the mortgage and torn away from it, but when, or by whom, does not appear. The proven and admitted understanding of Covillaud, as well as the nature of the transaction, is clearly inconsistent with a rightful retention of the note by Lewis; and this being so the presumption was all in Covillaud's favor, and the onus was clearly on Lewis of rebutting that presumption and of showing affirmatively that it was agreed that he should keep the note as a subsisting obligation, and that he so kept it as a part of the arrangement with Covillaud.

[185] \*IV. The assignment from Burlingame to Lewis invested him with no rights by which he could maintain this suit. It was executed and delivered after the suit had been commenced by Lewis against Burlingame for the balance unpaid of the Burlingame note, and before judgment.



This transfer purports to convey the interest which Burlingame had at the time of its execution in the mortgaged premises and the rents and profits, etc., but Burlingame at the time had no interest in them. It next purports to transfer Burlingame's right of action for the balance of the consideration money, but he had no claim for the balance of the consideration money over the \$4,000 which was paid him. Nothing more was coming to him. His equivalent for the conveyance to Nye and Covillaud was that \$4,000 paid to him, and a further implied covenant on their part that he should not suffer from his mortgage debt to Lewis. And until he had suffered from that debt there was no violation of their implied covenant with him in respect to that debt. He must have paid something before he had a right of action against Covillaud and Nye. (*Halsey v. Reed*, 9 Paige, 451, 452.)

V. A vendor's lien is not assignable—there is some conflict in the authorities, but the preponderance is against their assignability. (*Pollexfen v. Moore*, 3 Ark. 272; *Jackson v. Halleck et al.*, 1 Ohio, 318; *Tierinan v. Beam*, 2 Id. 306; *Bush & Stansbury v. Rensley, Adams et al.*, 14 Id. 20–27; 5 Yerg. 295, 215; *Leading Cases in Eq.*, Hare & Wallace's Notes, vol. 1, and cases there cited; *Webb v. Robinson*, 14 Geo. 216; *Welburn v. Williams*, 9 Id. 86; *Green v. Desmoss*, 10 Humph., 1 Geo., 165; 7 Yerg. 9, 13; 6 How. Miss. 362; *Devereux & Battle's Eq.* 390–392; 1 Paige's Ch. 502; 1 Freeman's Ch. 574, 584; *Shall v. Biscoe*, 18 Ark. 142.)

*Robinson & Beatty*, for Respondent, and *J. E. N. Lewis*, in pro. per.

I. That defendant first assumed to pay the mortgage debt to plaintiff is shown by the recital in their deed, and by the context and the subject of the agreement. Burlingame was selling his lot for \$10,000. He received \$4,000 down, and agreed to let the other \$6,000 go to pay his debt to Lewis. He was interested in paying \*this debt. If [186] not paid, he was personally liable to Lewis. After sale of the property to Covillaud and Nye, he had no interest in releasing the mortgage. The question to be determined here is, whether Burlingame appropriated \$6,000 of his

money to pay his own debt, or appropriated that amount to procure the release of a mortgage in which he had no interest. It is only necessary to determine that Burlingame was a sane man, and not an idiot or a lunatic, to determine that he appropriated his own money to pay his own debt.

II. What was the nature of the agreement made between Covillaud and Lewis in 1857, when Covillaud paid Lewis the \$8,000? Did Covillaud, by that transaction, do what Covillaud and Nye had promised to do—that is, did he pay the debt to Lewis, and thereby relieve Burlingame from responsibility, as under his contract with Burlingame, he and Nye were bound to do, or did he, regardless of his promise to Burlingame, only release the mortgage from his own property, and totally fail to perform the promise of Covillaud and Nye to Burlingame?

That Lewis only intended to release the mortgage and not the mortgage debt, is evidenced by the following facts: 1st. The indorsement on the mortgage is peculiar—(“Satisfied by being released.”) 2d. He delivered the mortgage to Covillaud, but retained the note. 3d. He indorsed as a credit on the note the \$8,000 received of Covillaud. 4th. Soon after he brought suit for balance due upon note against Burlingame. 5th. The note was pasted to the mortgage and he tore it off, showing deliberate intention to keep it. 6th. Lawton, who was the witness and agent of Covillaud, did not understand that Lewis was releasing Burlingame, or giving up his claim against Burlingame for the balance of the debt.

That Covillaud understood Lewis retained his debt against Burlingame, is rendered equally certain by numerous circumstances. He knew Lewis held a note against Burlingame; he knew it because the note had been pasted to the mortgage; he knew it because the note is referred to in the mortgage; he must have known that it is usual in all cases where large sums of money are secured by mortgage to give a note with [187] the mortgage. Yet, while he was careful \*to take up the mortgage, he says never a word about the note. Covillaud did not pay the \$8,000 in cash, but gave notes payable on time. He never made any objection to the payment of these notes. Surely he would have done so if he had been cheated out of the consideration.

The District Court has found this point in favor of Lewis. When this finding is sustained by such a weight of testimony, and there is such an absence of testimony on the other side, will this Court interfere with the finding of facts of the District Judge?

III. Admitting that Covillaud and Nye agreed with Burlingame to pay his debt to Lewis, could Lewis sue in his own name and without assignment upon that promise or undertaking of Covillaud and Nye? We do not deem this a material question in the case, for if Lewis originally had no right of action, Burlingame certainly did have, and he assigned that cause of action to Lewis. So that Lewis, whether he originally had a cause of action or not, certainly did have it by assignment. But we think, as the law is now settled by most if not all the modern decisions, Lewis had a right of action in his own name and without assignment. We refer the Court to the following cases: *Barker v. Bucklin*, 2 Denio, 45; *The Delaware & Hudson Canal Co. v. The Westchester County Bank*, 4 Id. 97; *Arnold et al. v. Lyman et al.*, 17 Mass. 400.

IV. Did the vendor's lien of Burlingame pass by his assignment to plaintiff?

Under our statute nobody doubts the assignability of the debt itself. If the debt may be assigned, why not the lien? This Court, in the case of *Phelan v. Olney*, 6 Cal. 478, decided that the assignment of note, secured by mortgage, carried with it an equitable assignment of the mortgage. The Court also, in the case of *Ritter v. Stevenson*, 7 Cal. 388, expresses the opinion that the written assignment of an account, secured by a mechanic's lien, would carry the lien itself. The authorities as to whether the mere assignment of a note which was given for the purchase money of real estate carries with it the right to enforce the vendor's lien by the holder of the note, are conflicting. The Kentucky, Indiana, and some other authorities, hold that the assignee of the note has the same right to enforce the vendor's lien which the vendor him-<sup>\*</sup>self had, while some other authorities hold that [188] the mere assignment of the note does not carry with it the right to enforce the vendor's lien. But the very same authorities, or at least some of them, which held that the assignment of the note would not carry the vendor's lien, held

or intimated that a special assignment of the lien by deed would entitle the assignee to enforce the lien, and we believe no single authority can be found contradicting this latter proposition where there was a real or attempted assignment of the lien. (See on this point *White v. Williams*, 1 Paige's Ch. 502; 7 Maryland, 132.)

COPE, J delivered the opinion of the Court—FIELD, C. J. and NORTON, J. concurring.

Covillaud and Nye purchased of one Burlingame a lot with the improvements thereon in the city of Marysville, and as a part of the consideration assumed the payment of a mortgage upon the property, in favor of the plaintiff, for the sum of \$6,000. Nye conveyed his interest in the property to Covillaud, and the latter arranged with the plaintiff for a release of his mortgage, agreeing to pay him the sum of \$8,000, in two instalments of \$4,000 each, and to secure the payment by a mortgage on the same property. This arrangement was carried out by the execution of the notes and mortgage as agreed on, and the release of the original mortgage, but as the debt and interest due from Burlingame amounted to more than the sum for which the notes were given, the note of Burlingame was retained by the plaintiff. The amount of the Covillaud notes was credited upon it, and a suit brought against Burlingame for the balance, and a judgment recovered, and the present action is against Covillaud and Nye upon their agreement to pay off the original mortgage. The action is based upon that agreement, and upon a written assignment from Burlingame to the plaintiff of his cause of action against Covillaud and Nye, including his lien as vendor, and the plaintiff asks a judgment for the amount claimed, and a decree enforcing the lien. The case comes up on appeal from an order refusing a new trial, and from a judgment granting the relief asked, and various objections are urged as grounds of reversal.

[189] \*It is objected that the agreement sued on does not bind Covillaud and Nye for the payment of the mortgage debt, and that it only amounted to an undertaking on their part to obtain a discharge of the mortgage as a lien upon the property. The intention obviously was to assume

the payment of the debt, and any other construction would be inconsistent with the circumstances under which the agreement was entered into, and could not be maintained even upon the strictest interpretation of the language used. It would be absurd to hold, that an agreement to pay a mortgage is complied with by procuring a discharge of the mortgage, leaving the debt unsatisfied; and particularly where the person agreeing to pay receives the amount of the mortgage debt as the consideration for the agreement. It is clear that the objection taken cannot be sustained, and that Covillaud and Nye in assuming the payment of the mortgage, retaining for that purpose the amount of the mortgage debt, assumed and intended to assume the payment of the debt.

It is objected further, that the plaintiff cannot sue upon the agreement for want of privity, and the case of *McLaren v. Hutchinson*, 18 Cal. 80, is relied upon in support of the objection. In that case the suit was upon an agreement made by the defendant with a third person to pay a debt owing by the latter to the plaintiff, and we held that as the plaintiff was not a party to the agreement, the action could not be maintained. The decision was placed upon the ground that there was no privity, but since the case was decided the matter has frequently been called to our attention, and we are by no means satisfied with the rule laid down. The agreement was founded upon a sufficient consideration, and the modern doctrine in such cases seems to be in favor of the maintenance of the action, and we are inclined to hold the question open for further investigation. It is unnecessary to pass upon it in this case, as the assignment of the cause of action enables the plaintiff to sue as the assignee of Burlingame, and in any event the point raised is untenable. It is claimed with reference to the lien, however, that it was not assignable, being a mere personal equity in the vendor, and not transferable by him to another. This point is covered by the decision just rendered in the case of *Baum v. Grigsby*, (ante 172,) and under the rule there laid down the objection is well taken.

\*The more important question in the case arises [190] upon the arrangement between Covillaud and the plaintiff, this arrangement being pleaded in discharge and

satisfaction of the original debt. The question, of course, is one of intention, and being purely a question of fact, we cannot interfere with the decision of the Court below, unless there is a want of evidence to sustain it, and the conclusion drawn is legally erroneous. The Court finds that the parties did not intend by the arrangement to extinguish the debt, and concludes that the effect was to release the mortgage and to pay the debt to the extent of \$8,000. If the finding is correct, the conclusion can hardly be complained of, and to sustain the finding the plaintiff relies upon the fact that the note was not surrendered with the mortgage, and upon the language used in discharging the latter as a lien. The words are, "satisfied by being released," and it is claimed that these words imply the existence of a debt, and show that the intention was to discharge the lien, and hold the debt as a personal obligation. There is some plausibility in this view, and taking the circumstances together, we are of opinion that there is sufficient evidence to support the finding, or at least to render interference on our part improper. We cannot consider the matter as an original question, for to do so would be to throw off our distinctive character as an appellate Court, and assume powers which the Constitution and laws have vested elsewhere. It is possible that upon the weight of evidence we should have arrived at a conclusion different from that of the Court below, but the question for us is, whether the finding is so plainly contrary to the evidence as to raise necessarily the inference of error. So far as mere opinion is concerned the finding is conclusive, and it is clear that upon the evidence before us we cannot interfere without overstepping the bounds of our legitimate authority. There are undoubtedly some embarrassing circumstances in the case, and it may be that due weight and proper consideration were not given to these circumstances, and that the finding is not in accordance with the intention of the parties. If so, it is unfortunate that relief cannot be administered, but it is one of those misfortunes for which no remedy seems to exist, for we cannot set aside the decision of the Court below upon a difference of opinion as to the weight of evidence.

[191] \*The rule is well settled that where the evidence is conflicting, or where the conclusion drawn from it is

not necessarily erroneous in point of law, the decision cannot be disturbed.

Our conclusion is, that as to the lien the judgment should be reversed, but that in other respects it should be affirmed.

Ordered accordingly.

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### HATHAWAY *et al.* v. DESOTO *et al.*

**PARTITION CANNOT BE MADE TILL FINAL SURVEY OF GRANT.**—The plaintiffs purchased from certain grantees of the Mexican Government an undivided one-half of the San Lorenzo Rancho, and received a deed therefor containing a covenant from their grantors who retained the other moiety, that they, plaintiffs, should have a right to an immediate partition, and might divide the premises by a line running east and west or north and south, and upon such division take the west half in one case and the north half in the other. Before the commencement of the present action the title of the grantees of the Mexican Government had been confirmed in the United States Courts, but the boundaries were not definitively fixed, the last survey by the Surveyor-General having excluded about 1,500 acres on the south side which had been embraced within the lines as fixed by the decree of the Land Commissioners, and for the correction of this alleged error in the survey, proceedings were pending. The object of the action was to obtain a partition of that portion of the premises embraced within the Surveyor-General's survey, the plaintiffs setting up their deed as the basis of their right to the partition, and praying that the northern half of this surveyed portion should be set apart to them, leaving the 1,500 acres subject to future arrangement. The decree adjudged that, by the covenant in the deed, plaintiffs were entitled to the partition as sought, and awarded to them the northern half of the surveyed portion in accordance with a division made by commissioners appointed for that purpose by an interlocutory order of the Court. From this decree the defendants, consisting of the other owners and certain incumbrancers, appealed: *Held*, that the decree was erroneous; that, under the covenants of their deed, plaintiffs could not have set apart to them the northern half of the surveyed portion, and at the same time retain an undivided interest in another portion upon the south side.

**PARTITION OF GRANT, WHEN CAN BE MADE.**—The proceedings for a partition should either be delayed until a final survey is made, or until a patent issues, or that the partition should be made according to the boundaries, as they might be ascertained in the present proceeding from the description in the original grant. *Held, further*, that even with the consent of respondents to release all claims to the unsurveyed 1,500 acres on the south, the decree could not be modified by this Court so as to award to plaintiffs the portion set apart to them in the decree in [192] full satisfaction of their claims, inasmuch as the boundaries being, by the facts appearing in the record, still undetermined, it was possible that by the final survey the southern boundary might be fixed still north of the line established by the Surveyor-General.

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<sup>1</sup> Cited as authority in *Sutter v. San Francisco*, 36 Cal. 116. See *Gates v. Salmon*, 35 Cal. 576; *Emerio v. Alvarado*, 64 Cal. 589; *Mound O. L. & W. Co. v. Philip*, 64 Cal. 479.

## APPEAL from the Third Judicial District.

San Francisco DeSoto, to whom the San Lorenzo Rancho had been granted by the Mexican Government, died in 1845, and by his will devised the said rancho, and all his property, to his wife, Donna Barbara de Castro, in trust for herself and his children, and appointed her and one Peralta as executors. By the will the executors were empowered, upon certain contingencies, to sell the whole or a portion of the property.

Peralta never qualified as executor, and the duties of the trust devolved upon the widow alone. On the twenty-fourth of March, 1853, the executrix executed to Brady and Jones, from whom the plaintiffs derive their title, the following deed:

“STATE OF CALIFORNIA,  
County of Santa Clara. }

“This indenture, made this twenty-fourth day of March, A. D. one thousand eight hundred and fifty-three, between D<sup>a</sup> Barbara Castro, widow of the deceased Don Francisco Soto, resident of the county of Contra Costa, of the first part, and William Carey Jones, of the city of San Francisco, and Lewis Brady, of said county of Contra Costa, parties of the second part, witnesseth: That said party of the first part has bargained and sold, and does hereby bargain, sell, and convey to said parties of the second part, all the right, title, and interest which she, the said D<sup>a</sup> Barbara, has or may have, either in her own right or by law, or by the last will and testament of her late deceased husband, or that as executrix or administratrix under said will she has or can have the right to dispose of, in and to the following described property, to wit: All that rancho or tract of land called the Rancho of San Lorenzo, situated in the place called San Lorenzo, in said Contra Costa county, or rather in the lately formed county of Alameda, and which was granted by the Mexican Government to the late Don Francisco Soto, and supposed to contain one sitio and a half, or one and a half square [193] \*leagues, Mexican measurement; that is to say, one undivided half part of all of said rancho or tract of land, with all its profits, appurtenances, and advantages; *provided, nevertheless*, that said purchasers, parties of the



second part, shall have a right to an immediate partition of said land, and may have the privilege of dividing the same in equal parts, either latitudinally or longitudinally, as may to them seem best; but, *provided*, that if they divide it longitudinally, that is, by a line drawn from the creek of San Lorenzo to the creek called Del Alto, they shall not take that portion which lies next to the mountain, but shall take that part which fronts upon the bay; and from such salinas, or salt deposits, as there may be on the same, said D<sup>a</sup> Barbara shall always have the privilege to take such portions of salt as she may require; and if said purchasers shall choose to divide the said land latitudinally, that is by a line drawn from the mountains to the bay, then they shall not take that part that lies next to said creek called Del Alto, but shall take that part which lies next to the creek of San Lorenzo. And, on the said division being made, this instrument shall operate as an immediate release and conveyance from said party of the first part to the said parties of the second part, of the particular portion of said rancho as under the foregoing conditions they may elect to take, with all its appurtenances, that is the appurtenances of said one-half. The consideration of this purchase is the sum of \$35,000, by said parties of the second part to said party of the first part, in hand paid and secured to her satisfaction, and this sale and conveyance is absolute to said parties of the second part, their heirs and assigns, forever.

"In testimony whereof, we have hereunto set our hands and seals, at Pueblo San José, the day and year above written.

"The words 'to take' interlined before signing.

"Signed, sealed, and delivered in presence of

"FREDERIC HALL,

"PETER DAVIDSON.

"BARBARA <sup>he.</sup>X CASTRO, [L.S.]  
<sub>mark.</sub>

"WM. CAREY JONES, [L.S.]

"LEWIS BRADY. [L.S.]"

\*Under this deed Carey and Jones, and subsequently [194]  
as successors to them, the plaintiffs entered into pos-

session of the northern portion of the rancho, which possession they retained at the commencement of the present action.

Proceedings for confirmation of the grant were commenced before the Board of Land Commissioners, by whom the grant was confirmed with certain specified boundaries. From their decree an appeal was taken to the United States District Court, where a final decree of confirmation was rendered, leaving the boundaries, as described in the original grant, to be ascertained by official survey. A survey was made by the Surveyor-General, by which about 1,500 acres on the southern side, which had been included within the boundaries as fixed by the Land Commissioners, was excluded, and left without the southern line.

While the question of boundary was in this condition, and proceedings being taken to correct the official survey, the plaintiffs commenced the present action for the purpose of obtaining a partition of the premises, making the widow and other owners, together with certain incumbrancers, parties defendant.

The complaint set up substantially the foregoing facts, and stated that plaintiffs had elected under the stipulation in the deed to take their portion of the land upon the northern side of the rancho, and concluded with a prayer that the portion of the rancho embraced within the survey of the Surveyor-General might be divided by a line running east and west into two equal portions, and the northern portion awarded to them, leaving the 1,500 acre tract, which had been excluded by the official survey, to be the subject of future arrangement. Demurrers were interposed to the complaint, and overruled. Defendants answered, and a trial was had before the Court without a jury resulting in findings in favor of plaintiffs. An interlocutory decree was entered, adjudging that plaintiffs, by virtue of the covenants in the deed above set forth, were entitled to the relief prayed for, and appointing commissioners to divide so much of the rancho as was included in the official survey. Upon the report of these commissioners, a final decree was entered, setting apart to plaintiffs the northern half of the surveyed portion of the rancho. From this decree defendants appeal.

[195] \*The case was argued by a number of counsel

with much research and ability, but principally upon points not touched upon in the opinion. Whether the complaint stated a cause of action; whether the will of DeSoto authorized in any event the sale of the real property; whether if it did, the contingencies upon which a sale was authorized had arisen at the time the deed was made, were questions elaborately discussed, but as the decision of the Court was placed upon grounds not involving these points, it has not been deemed necessary to state with more particularity the facts in relation to them or to give the arguments of counsel thereon.

*A. M. Crane and Robert Simpson, for Appellants.*

Not only the complaint alleges, but the evidence shows, that the bounds and extent of this rancho were unsettled.

The map of the Surveyor-General is produced. This map and survey the plaintiffs say in their complaint is incorrect, and that it cuts off and excludes 1,500 acres from the rancho as confirmed. In connection with the map, plaintiffs also produce the certificates of the Surveyor-General, and copies of the decrees of the United States District Court. Defendants show that this survey had been ordered into the United States District Court for revision. And yet on this unsettled survey—a survey yet pending and undetermined, one that the plaintiffs tell us in their complaint is grossly incorrect—this partition is made! The transcript shows that the precise land embraced in this incorrect and unsettled survey is the land actually partitioned. And the Court in its final decree expressly excepts the 1,500 acres from this partition, and leaves that to be made the subject of some future partition. The absurdity of this proceeding is its own best illustration. Suppose the lines and extent of the rancho should finally be settled altogether different from and so as to embrace a part only of the land partitioned in this suit? Some of the parties might thus be deprived of any land, and others have more than their fair share.

The lines and boundaries of this rancho are not yet fixed. No one now knows or can say what are its limits. This is an open and unsettled question.

But if it may be taken for granted that the land al-

[196] ready parti-\*tioned will finally fall within the limits of the rancho, (and this is a mere assumption,) yet the absurdity of asking for a piece-meal partition still remains. (Story's Eq. Jurisp. sec. 1526; 5 Cal. 114; *Cobin v. Corwin*, 15 Wend. 557; *Stevens v. Lockwood*, 13 Id. 664; *Bendernagle v. Cox*, 19 Id. 202; *Gurnsey v. Carver*, 8 Id. 492; *Smith v. Jones*, 15 J.R. 229; see also Story's Eq. Pl. sec. 287; Cooper's Eq. Pl. 184, 185; *Pufey v. Pufey*, 2 Vern. 29; Milford's Eq. Pl. 183; *Newland v. Rogers*, 3 Barb. Ch. 435.)

The plaintiffs claim in their complaint that they are entitled to the north half of the rancho, and so the Court says by its decree. But, by and by, they are to get seven hundred and fifty acres off from the extreme south half, and some two miles distant from where they and the Court say their land lies! When that other partition takes place, the defendants also will get a share in this 1,500 acres, according to the interest held, some of them, as calculation will show, as low as ten acres—every owner being thus provided with two distinct parcels of land at a distance from each other, in virtue of his common ownership in the whole tract. This proposition is too absurd for comment. The foregoing is only a fair statement of not only what might but what will take place in this very case, if the statements of the parties in the pleadings are to be credited, and the final decree provides that it shall or, at least, may occur.

*Nathaniel Bennett*, for Respondents.

It is objected that a partition of the rancho cannot be had, because there is another tract of 1,500 acres, which is claimed by the owners of San Lorenzo Rancho as belonging to their grant, and by the owners of the land adjoining on the south as belonging to them.

There are several answers to this objection: 1st. As the facts are exhibited at present, such additional parcel of land belongs to the rancho adjoining on the south; for by the survey of the United States Surveyor-General, made in pursuance of the decree of the District Court of the United States, this surplus has been included within the bounds of the last mentioned rancho, and excluded from

[197] \*the limits of the San Lorenzo Rancho. Until that

survey is set aside, this additional tract of land belongs, to all intents and purposes, to the southern rancho. 2d. Even though it did belong to the San Lorenzo Rancho, it constitutes a tract separate and apart from it—that is, the San Lorenzo Rancho has definite boundaries, exclusive of that additional parcel of 1,500 acres. Each parcel, therefore, constitutes a distinct lot by itself. And it is an unquestionable rule in equity, that where persons are tenants in common of two or more distinct and separate lots or parcels of land, either one of them may have a partition of one parcel without including the other. The only question, in any event, is one of costs. It may be that the plaintiff, in some cases, will not be allowed costs.

In New York, under the old chancery system, there was an express rule of the Court on the subject, which prescribed, in substance, that where several tracts or parcels of land were owned by the same persons in common, if a separate bill should be filed for the partition of a part thereof only, the share of the complainants might be charged with all the costs; (2 Barb. Ch. Pr. 291; 175th Rule of the Old Court of Chancery of N. Y.,) thus, clearly implying that a demurrer would not lie to a complaint, because it sought the partition of only one of several parcels of land held by tenants in common.

There is no more reason, on principle, why a person may not bring a suit to partition one of several parcels of land than there would be in a rule that he should not be permitted to bring ejectment for one of several parcels of land, all of which were held by the same defendant. And it was eminently proper that this suit should be brought as it was. It may and probably will be years before the rights of the contending parties to the 1,500 acres will be settled. And it would, to say the least, be a very great inconvenience to the plaintiffs, and probably to the other owners in common, to be obliged to rest for a long time under the uncertainty of title to which they are subject without a definite boundary line existing between them.

That portion of the complaint relating to the 1,500 acre tract was inserted out of abundant caution, in order that the plaintiffs might not be precluded from claiming their propor-

[198] tion in any after \*litigation. If it does no good in the complaint, it certainly cannot harm it. And it may be found of benefit in future litigation. At the worst, it can, for the present, be regarded only as surplusage.

The defendants say: "Suppose the lines of the rancho should finally be settled altogether different from and so as to embrace a part only of the land partitioned in this suit?" This supposition is made in connection with the difficulty the defendants find in the partition of the rancho independently of the tract of 1,500 acres. I have but one remark to make on this subject, in addition to what I have already said, and that is, that the supposition of the defendants is wholly inadmissible. It is not supposable, in this case at least, that the lines of the rancho, or that part of the rancho sought to be partitioned, will be settled in any manner different from the lines as claimed in this suit. The question has not been raised as to the boundaries of the rancho either in the complaint, or in the answer, or at the trial, or in any part of the proceedings, until, without any basis whatever for it, the point is started by the counsel for the defendants in their argument on this appeal. It is barely necessary to suggest, that an argument based on a bare supposition is entitled to no weight. The lines and boundaries of the rancho are fixed—its limits are well known and defined; so far as those limits are concerned there is no open and unsettled question. The authorities cited by the defendants have no application, and I shall not take the trouble to review them. If we are entitled to a partition of the land in question, it is no answer to our application that we may, perhaps, at some future time ask for the partition of some other and additional tract.

*John Satterlee, Horace Hawes, S. Heydenfeldt, Crockett & Crittenden*, also, for Respondents. The argument of these gentlemen, as also most of that of Mr. Bennett, was addressed to points not considered in the opinion of the Court.

NORTON, J. delivered the opinion of the Court—FIELD, C. J. and COPE, J. concurring.

The deed, under which the plaintiffs claim title to the premises which they ask to have partitioned, conveys the undivided

half of \*the tract of land called the Rancho of San [199] Lorenzo. It also contains a provision that the grantees shall have a right to an immediate partition, and may divide the premises by a line running east and west or north and south, and upon such division shall take the west half in the one case or the north half in the other. At the time this action was brought, the boundaries of the rancho had not been definitely settled in the proceedings instituted to obtain a patent. This provision for a right to select a definite half contained in the deed, and the uncertainty of the boundary, have occasioned an embarrassment in the proceedings which will require the judgment to be reversed.

The plaintiffs state in their complaint that the United States Surveyor-General has made a survey which cuts off about 1,500 acres from the south side of the rancho, which belongs to the rancho according to the decree of confirmation made by the Board of Land Commissioners, and they ask that a partition be made of the rancho as surveyed by the United States Surveyor-General, and that the north half as so surveyed be allotted to them, excluding from the partition the said 1,500 acres, and leaving that portion to be hereafter partitioned. The decree of partition has been made as asked by the plaintiffs. The interlocutory decree did not direct a simple partition of the rancho into two equal parts, but adjudged that the plaintiffs were entitled to the northern half pursuant to a selection made by them under the terms of the deed, and directed a partition to be made of the rancho, as surveyed by the United States Surveyor-General, by a line running east and west, and that the north half be allotted to the plaintiffs, and that the 1,500 acres be unaffected by the partition, but be left to be hereafter partitioned. The Commissioners made the partition and allotment as directed by the interlocutory decree, and the final decree is the same. It is obvious that the plaintiffs cannot claim and hold the northern half as a strict right under the deed, and at the same time have a right to a portion of the rancho to be hereafter set off to them on the extreme south side of the rancho. This does not depend upon the question whether, upon a partition of a tract of land between two parties owning each an undivided half, the portions allotted to each must in

all cases be in one body, but results from the fact that [200] in this\*case the decree is based upon the right claimed by the plaintiffs to a specific part of the rancho. The Court below decided that it was bound by the provisions of the deed to set off to the plaintiffs the portion selected by them. But the provision of the deed is explicit that if the grantees elect to divide by a line running either east and west, or north and south, they must take their portion on one side and not on the other. They have elected, and the Court has decreed that they are entitled to the portion lying north of a line running east and west, and this necessarily excludes them from any portion lying south of that line.

Five briefs have been filed on behalf of the respondents by different counsel, in one of which it is said the respondents are content to take the portion allotted to them and waive any claim to the 1,500 acres, and consent that the decree be amended to that effect. Such a statement made in a brief by one of the several counsel, and not the attorney of record, and not being filed as a stipulation, would hardly authorize this Court to make a modification of the judgment. The Court has a right to modify a judgment on appeal in the respect mentioned in the notice of appeal. In this case, the appeal is from the whole judgment, and every part, but no particular portion is mentioned as specially appealed from. The plaintiffs have not appealed, and we should not be authorized to make such a modification in the decree to their prejudice. They have elected to take a certain portion of the rancho with the right to have a further portion hereafter set off to them; that is, they have asked to have the north half of so much of the rancho, as is included in the survey of the Surveyor-General, now set off to them in case they can hereafter obtain the half of the residue of the rancho. Possibly, they would not have asked or acquiesced in a decree giving them less than one-half of the entire rancho. But if we might make such a modification of the decree, there remains another objection equally fatal. The partition is not made of the rancho as described in the deed under which the plaintiffs hold, but as it has been surveyed by the United States Surveyor-General. But this survey does not appear to be a final survey. It is, therefore, not binding upon the parties to this



action. It may be probable that either this survey will become final or that some other survey \*will carry [201] the boundary further south and embrace more land, and that hence, the defendants will not be injured but may be benefited by allowing the present partition to stand, but it is possible the ultimate survey and patent may fix the southern boundary still further north; in that event, the defendants would by this partition be deprived of a portion to which they are entitled—that is, a line dividing the rancho into equal parts as its bounds may ultimately be fixed would run north of the line now fixed. There is no authority for the plaintiffs or the Court to take notice of and make partition according to that survey. Either a partition should be delayed until the survey becomes final or the patent issues, or it should be made according to the boundaries, as they may be ascertained in this proceeding, from the description given in the grant to DeSoto.

Many other objections have been taken in this case, as well to the sufficiency of the allegations of the complaint as to the title of the plaintiffs, depending upon the construction of the will of DeSoto. The conclusion we have arrived at on the point we have been considering has obviated the necessity of deciding upon those other objections, and we deem it appropriate, on account of the importance of some of them, to say that no inference is to be drawn as to our opinion in regard to them from our not having noticed them in this opinion.

The judgment is reversed, and the cause remanded for further proceedings.

On application by appellants for a modification of the opinion, NORTON, J. delivered the opinion of the Court—FIELD, C. J., concurring.

We are asked to modify our opinion in this case so far as it “confers or may be construed to confer on the Court below any power or authority to ascertain or settle, for the purposes of this partition, the boundaries or extent of the San Lorenzo Rancho.”

No modification of the opinion is necessary. The situation of lands in this State is rendered peculiar by the necessity of having patents issued by the United States for all tracts held

by private owners and the uncertainty that must in [202] the meantime exist as to \*the exact boundaries as they may be ultimately fixed in the patent. If any objection to the making of a partition exists in any case on this account, it should be presented in the answer and the necessary facts set forth, whereupon the Court could determine the necessity and its authority to dismiss the complaint or to stay proceedings until the boundaries should be settled by the proceedings instituted to obtain the patent. In the present case, this objection was not raised to proceeding in the action, and the fact that there were any proceedings pending for a patent only appears incidentally. After this case is returned to the Court below, either party will have an opportunity to apply to that Court for leave to amend the pleadings, or by a petition to present the necessary facts to show the propriety of a stay of proceedings, and if granted, then upon the boundaries becoming fixed by the proceedings before the United States tribunals, to bring the proper facts into the case by amendment or supplementary pleadings.

The application to modify the opinion is, therefore, denied.

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### TOUCHARD *et al.* v. KEYES.

<sup>1</sup> **EXECUTOR OF COTENANT MAY UNITE IN ACTION.**—Tenants in common can unite in this State by statute in an action for the possession of real property, and the executor of a deceased tenant in common can unite with the cotenants of his testator in such actions.

<sup>2</sup> **ALCALDE'S RECORDS.**—The books of record of deeds, mortgages, and other instruments, kept by Alcaldes previous to the organization of the State Government, which were transferred to the custody of the County Recorder by the Act of April 13th, 1850, entitled "An Act concerning the Transfer of certain Records, Conveyances, and Papers," have been placed by the twenty-first section of the Act of March 26th, 1851, entitled "An Act concerning County Recorders," upon a footing with other records kept by the County Recorders; and certified copies of instruments found therein are admissible in evidence under the same circumstances as

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<sup>1</sup> Cited as authority in *Goller v. Fett*, 30 Cal. 484; *Reynolds v. Hosmer*, 45 Cal. 631.

<sup>2</sup> Commented on in *Davis v. Davis*, 26 Cal. 45; and in *Garwood v. Hastings*, 33 Cal. 219.

are certified copies of records made by the Recorders themselves—namely, upon proof of the loss or the inability of the party to produce the originals.

**INDEX**—Per NORTON, J., *dissenting*.—The twenty-first section of the Act concerning County Recorders of March 26th, 1851, applies only to such records as are by that act required to be kept in the Recorder's office. It has no application to the records of Alcaldes which by a previous act had been transferred to the custody of the Recorders, and a copy from such records is not admissible upon the certificate of the Recorder.

**\*APPEAL from the Seventh Judicial District.**

[203]

This was an action of ejectment to recover certain real estate situated in Sonoma county. The plaintiffs claimed under a Mexican grant issued by Pio Pico, Governor of California, to Juan Padilla, on the twelfth of June, 1846, of a tract of land known as "Bolsa de Tomales," containing five square leagues. On the trial the plaintiffs attempted to trace title from the grantee, Padilla, by sundry mesne conveyances. Of these conveyances the original of one could not be produced, and the plaintiffs offered a certified copy of the conveyance found in the book of records of deeds and other instruments kept by the Alcalde of the district of Sonoma in 1849, the certificate being made by the Recorder of the county of Sonoma, in whose office the original records are deposited. To the conveyance, as it appears on record, is attached a certificate of acknowledgment of the grantors before the Alcalde of the district. All other material facts are stated in the opinion of the Court.

*John W. Dwinelle and H. P. Hepburn, for Appellants.*

The Court below erred in excluding the certified copy of the conveyance from the records of deeds kept by the Alcalde of the district of Sonoma.

1. The conveyance was executed by parties whose very names indicate a Mexico-Californian origin, partly in the Spanish language, and possesses all the requisites of a conveyance under the Mexican law, celebrated before a Mexico-American Alcalde, before the introduction of American laws. It must, therefore, be presumed that the paper found inscribed in the Alcalde's records was an original and authentic instrument, and not a recorded copy. Therefore by the Act concerning Conveyances, passed April 16th, 1850, sections forty-one and forty-two, this conveyance was to be proved according

to the laws in force previous to April 16th, 1850, and this mode of proof, under the Mexican laws, was not by producing the original, but by obtaining a certified *traslado*, or copy, from the acting *escribano*. In addition to this, this Court has often decided that the records of the Recorder's office [204] must not be removed from one \*county to another for the purpose of being used in evidence, and thus exposed to casualties, and that exemplifications of them by the proper officer are evidence, on general principles, and in the absence of any legislation on the subject. (*Gregory v. McPherson*, 13 Cal. 574, and authorities there cited.) These latter decisions alone would authorize the introduction of secondary evidence of the Alcalde's records, if they have the character of original instruments.

2. By the laws of Mexico all conveyances must be executed before and recorded by an *escribano*, who thus acted as Commissioner of Deeds and Recorder of Conveyances. (Law 29, lib. 8, tit. 13 of the *Leyes de las Indias*; Arrillaja's Decretos for 1838, 421, cited in *Hoen v. Simmons*, 1 Cal. 122.) But where there were no official *escribanos*, the Judge of the First Instance acted as such. (*Panaud v. Jones*, Id. 488.) And where there was no Judge of First Instance the local Alcalde acted as such. (*Mena v. Le Roy*, Id. 216.)

By an Act of the Mexican Congress of July 15th, 1839, it was provided, that in cases of absolute vacancy, or of the sickness, death, or any legal impediment whatsoever, of the Judges of First Instance, their places shall be supplied by the Alcaldes, etc. (Minutes of the proceedings of the Legislative Assembly of San Francisco, etc., p. 295.)

On Nov. 14th, 1843, Gov. Micheltorena decreed as follows:

\* \* \* \* \*

"1st. There shall be held at Monterey and the city of Los Angeles, as chief towns of the district, elections for Ayuntamientos, composed each of a first and second Alcalde, four Regidores and one Syndico.

"2d. In the pueblos of San Diego, Santa Barbara, San Juan, Villa de Branciforte, Pueblo de San José, San Francisco, and Sonoma, elections will be held of two Alcaldes of first and second nomination.

"4th. The first Alcaldes of which these provisions speak will perform the duties which belong to Judges of First Instance, in conformity with the decree of July 15th, 1839, [lastly above cited,] \*and they will also take [205] charge of the Prefectures of their respective districts."

So that we have not only the general law cited above in *Mena v. Le Roy*, 1 Cal. 216, but a special decree giving the First Alcalde of Sonoma the functions of Judge of First Instance. Alcalde, without any other designation, used as a designation of office by one acting as Judge of First Instance, will be presumed to be First Alcalde.

3. When the Americans came into the country after the conquest and brought in their customs, they introduced the custom of treating the Alcalde as a notary in two respects: 1st, as a commissioner of deeds; and 2d, as a recording officer. This custom was sufficient to change the law. (*Von Schmidt v. Huntington*, 1 Cal. 64; *Reynolds v. West*, Id. 326; *Panaud v. Jones*, Id. 500; *Tevis v. Pitcher*, 10 Id. 477.) The doctrine of these cases was fully approved in *Adams v. Norris*, 23 How. 353.

That this custom was universal and recognized by the highest authority, appears from the fact that on September 20th, 1849, "The Superior Judicial Tribunal of California" adopted a tariff of fees for judiciary [judicial?] officers. For Alcaldes, as such, no fees for recording conveyances were provided. But for "Notaries Public," as recording officers, the following provisions were made: "For original acts of any kind, including recording the same, for every hundred words, one dollar. \* \* \* For making copies of all official documents, for every hundred words, one dollar. \* \* \* For certificate of mortgage for every hundred words, fifty cents; with seal, one dollar. For cancellation of mortgages, five dollars. For recording a deed of [or?] mortgage, for every hundred words, one dollar. For recording all other papers, for every hundred words, fifty cents."

These acts are all descriptive of those performed by the Alcalde as *ex officio* notary under the Mexico-Californian laws and customs, and such as were performed by no other notaries in the country. The "Tariff of Fees," therefore, shows not only a custom amounting to law, but also its recognition by

the highest judicial tribunal then known to the laws of California.

4. The Legislature of 1850 considered these Alcalde [206] records of \*value. By an act passed February 28th, 1850, entitled "An Act to supersede certain Courts and to regulate Appeals therefrom to the Supreme Court," they were directed to "be delivered to the County Clerk of the county which the District Judge may direct, to be by him kept and disposed of according to law." (Laws of 1850, chap. 23, sec. 39.)

By another act passed April 13th, 1850, entitled "An Act concerning the Transfer of certain Records, Conveyances, and Papers," the County Clerk was directed to transfer such books, within ten days after he received them, to the Recorder of his county, who was directed to "keep and preserve" the same "as part of his records." (Laws of 1850, chap. 93, secs. 1 and 2.) And by the "Act concerning County Recorders," passed March 26th, 1851, it is provided in the twenty-first section, that "copies of all papers duly filed in the Recorder's office, and transcripts from the books of records kept therein, certified by the Recorder to be full, true, and correct copies or transcripts, shall be received in all Courts, and in all actions and proceedings, with the like effect as the original instruments, papers, and notices, recorded or filed, could be if produced." (Laws of 1851, chap. 25, sec. 21.)

It cannot be doubted that, under sections forty-one and forty-two of the Act concerning Conveyances of 1850, this particular conveyance, if the original were produced, could be read in evidence, or even recorded under our existing laws. It is exceedingly formal and perfect.

*J. Clarke*, for Respondent.

The rejection of the certified copy of the conveyance from the Alcalde records by the Court below, counsel of appellants contend was error, and they argue (not very plausibly to be sure) that the pages from the book which the Recorder copied were not the recorded copy of an original instrument executed *inter partes*, viz., of a deed of conveyance, but the very original writing itself, executed by the Alcalde, and pronouncing or declaring the sale to have been executed before him. The

difference between these two things is apparent; indeed, nothing could well be more unlike, either in form or in legal consequences. The usual commencement \*of [207] the one (the common law conveyance) is: "Know all men by these presents, that I," the vendor, etc.; the other (the civil law, or Mexican act of sale): "In the pueblo of Sonoma, before me, the Alcalde, appeared," so and so, "and the one said that he sold and the other that he received," etc. In short, in the latter instrument the Alcalde, or other official, himself makes a record of the sale verbally consummated by the parties before him; and this record is, like a Court judgment, the original thing, which should always remain in the office, copies only being delivered to the parties or others.

The learned counsel contend that what is now in this Alcalde's book, in the Recorder's office, (the copy of which they offered,) is the original entry or record. And the reason of this is obvious—for if such be the description of the instrument in question, it would be very strange law indeed which would not permit the certified copy to be used in evidence; whereas, if the original document is or was in the hands of the vendee—if that which was placed upon the Alcalde's book is but a copy of this original document—then an entirely different set of questions would arise, viz.: 1st, whether the absence of the primary evidence (the deed itself) were sufficiently accounted for; and 2d, whether the alleged copy was the proper secondary evidence of its contents.

The arguments of the learned counsel to show that the document in question was the original "celebration" of the sale before the official, and not the recorded copy of an ordinary common law deed, are curious. First they say: "The names of the parties indicate a Mexican origin." But not choosing to dwell on this point, they proceed to say that the instrument is written "partly in the Spanish language." Unfortunately for them, upon looking at the instrument to see what part of it is in Spanish, we find conclusive evidence, in this very fact, that the writer of the document was not only a person conversant with English forms of conveyancing, but that he could not translate Spanish at all! The Spanish part of the deed is merely the description of the land, copied, word for word,

from the grant, and evidently because the draftsman thought he could not give the purport of it in English.

The instrument speaks for itself. It is a deed, and [208] nothing else. \*It was "signed, sealed, and delivered."

The vendors speak in it, not the Alcalde. The Alcalde himself, *anglice*, Mr. Fuller, who probably wrote the deed, added an ordinary certificate of acknowledgment on the back of the instrument—"the within instrument" are the words used, but which could not have been used if the original writing was that upon the pages of the book.

But counsel proceed to argue that, although compelled to yield the point in regard to the character of the instrument, still the certified copy of a copy was good evidence.

The object of section twenty-one of the Recording Act was to save the necessity of bringing into Court the Recorder's books and papers, and the certified copy is only evidence of the existence and correspondence of the thing copied.

But counsel contend, that even if the certified copy of the deed is not admissible under the statute, as being taken from a book, which, though without authority of law, so far as copying deeds by American Alcaldes, in 1849, was concerned, was, nevertheless, ordered by the Legislature to be removed to the Clerk's office, and thence to the Recorder's office, there to be "kept" by him, still it is good as "secondary evidence," nay, that it is a "superior class" of secondary evidence; and they argue to show that it is an official record, and is, therefore, covered by section twenty-one, above referred to; that it was "regularly recorded," and, therefore, a copy would come in under the Act of 1857. Whereas, if there is anything that is at all apparent in this discussion, it is that Mr. Alcalde Fuller, in taking an acknowledgment of a common law deed, and copying it into a book in his office, was doing an unofficial act, and one to which no legislative sanction or effect has been subsequently imparted.

FIELD, C. J. delivered the opinion of the Court—COPE, J. concurring.

In this State, by statute, tenants in common can unite in an action for the possession of real property. (Laws of 1857, ch. 68.) And executors and administrators can maintain such



actions in all cases where their testators or intestates could have maintained them, until the administration of the estates they represent is \*closed, or the property is distributed under decree of the Probate Court. (*Meeks v. Hahn*, 20 Cal. 620.) The executor of Matthey and the tenants in common with him are, therefore, properly joined as plaintiffs.

The present action is for the possession of real estate situated in the county of Marin, and the plaintiffs base their right to a recovery upon a grant issued by Pio Pico, Governor of the Department of California, to Juan Padilla, in June, 1846, and sundry mesne conveyances from the grantee. Of these mesne conveyances through which the plaintiffs trace title, one executed in November, 1849, could not be produced. Its execution was shown, and proof was made of diligent but unsuccessful search for it by persons with whom and in places where it would probably be found if in existence. The plaintiffs thereupon offered a certified copy of the conveyance from the records of deeds kept by the Alcalde of the district of Sonoma in 1849. This district embraced the territory comprising the present counties of Marin and Sonoma, and adjoining counties. The records are now in the custody of the Recorder of Sonoma County, and the certificate to the copy offered was made by him. Upon objection of the defendant, the certified copy was excluded by the Court. The specific ground of the objection is not stated in the transcript before us, but we infer from the argument of counsel that it was this: that the statute had not legalized the records, or authorized copies of instruments found in them to be received in evidence; in other words, that the records were mere private entries of the Alcalde, not made in pursuance of any law, or custom having the force of law, or since recognized by any law, and, consequently, had not the dignity of other records in the Recorder's office. If this be the specific point of objection, and no other is suggested by counsel, it was not well taken. In the settlement of California by citizens of the United States, after the conquest, and until the organization of the State Government, and the establishment of Recorders' offices in the different counties, the local Alcaldes were the only officers (with one or two exceptions) who kept

any records of conveyances. Whether there was any authority by law to keep such records it is not necessary to inquire.

Either from supposed authority of existing law or [210] general consent, \*every one resorted to them for the registration of his deeds, and also for examination as to titles held by others. And the Legislature, at its first session under the Constitution, recognized, by repeated acts, the records of deeds and other instruments kept by them as public records which were subject to its control. On the twenty-eighth of February, 1850, it passed an act providing that "*Books of records* of deeds, mortgages, powers of attorney, and other instruments, *kept by or in the possession of any Alcalde, Judge of the First Instance, Notary, or other officer, shall be delivered to the County Clerk of the county which the District Judge may direct, upon the election and qualification of each County Clerk, to be by him kept and disposed of according to law.*" (Ch. 23, sec. 39.) And on the thirteenth of April of the same year, it passed another act, requiring the County Clerk to transfer these "*books of records* of deeds, mortgages, powers of attorney, and other instruments," to the Recorder of his county within ten days after the same should come into his possession, and the County Recorder to keep and preserve them "*as part of his records.*" (Ch. 93, secs. 1, 2.) And by the twenty-first section of the Act of March, 1851, concerning County Recorders, the Legislature of the following year provided, that "copies of all papers duly filed in the Recorder's office, and transcripts from the *books of records kept therein*, certified by the Recorder to be full, true, and correct copies or transcripts, shall be received in all Courts, and in all actions and proceedings, with the like effect as the original instruments, papers, and notices, recorded or filed, could be if produced." (Ch. 25, sec. 21.) This section applies as much to copies from the Alcalde records, which by the Act of April 13th, 1850, are to be kept by the County Recorder as "part of his records," as it does to records made under the Act of 1851. In adopting it, the Legislature was aware of the fact that the Alcalde records had been deposited in the offices of the different County Recorders, pursuant to the legislation of the previous year, and were kept by them as part of their records. The Legis-

lature was also aware that these Alcalde records were the only ones (with one or two exceptions) kept in the country during the period intervening between the conquest and the organization of the State Government, and that they \*contained the only evidence which could, in the vast [211] majority of cases, be produced of transfers of real property during that period. Indeed, it would not, perhaps, be going too far to say that in nine instances out of ten—owing to the migratory habits of the people at the time, the numerous fires which had swept over our principal cities and towns, and to circumstances peculiar to a new and unsettled country—it would be impossible for parties to produce the original instruments by which title to real estate was transferred during this period. The Legislature, therefore, placed the Alcalde records on a footing with other records kept by the County Recorder, and a certified copy of an instrument found therein is admissible under the same circumstances as are certified copies of records made by himself—upon proof of the loss of or the inability of the party to produce the original. The District Court, therefore, erred in excluding the certified copy offered in the present case. This error requires a reversal of the judgment, and renders it unnecessary to consider the other errors assigned by the appellants.

Judgment reversed, and cause remanded for a new trial.

NORTON, J. dissenting.—I am unable to agree with the majority of the Court in the interpretation they give to section twenty-one of the Act concerning County Recorders, passed March 26th, 1851.

This act is a reënactment, with slight amendments, of the Act concerning County Recorders, passed April 4th, 1850. The Act of 1850 was passed before the passage of the act requiring the papers and books of the superseded Alcaldes' offices to be deposited in the office of the County Recorder. The Recorders' Act was adopted for the purpose of providing an office where certain instruments could be recorded and deposited. It prescribes that the Recorder shall procure suitable books (sec. 3) and shall record in them all deeds, etc., which shall have been proved or acknowledged according to law, and authorized to be recorded (sec. 10.) Then by

section twenty-one it provides, that copies of all papers duly filed in the Recorder's office, and transcripts from the books of records kept therein, certified by him, shall be presumptive evidence of the facts therein contained. The act had in previous sections provided that certain books should be [212] provided and kept in the office, and \*that deeds, etc., should be recorded in them, which should have been proved or acknowledged according to law. The natural and obvious application of section twenty-one is, therefore, to give the weight of presumptive evidence to transcripts from the books which by that act are required to be kept in the Recorder's office. There is no provision of the act that indicates that the Legislature contemplated that this section should apply to any books that by any future law might be authorized to be deposited with and safely kept and preserved by the Recorder. The section as it stands and as applicable to books authorized by that act to be kept, is in consonance with other laws applicable to the registry system. It does no violence to established principles of evidence. It only gives the weight of evidence to deeds, etc., which have been proved or acknowledged according to law. This section is modified in the law of 1851, but not in any particular affecting the question as to what instruments it is applicable. The law of 1851, instead of making these transcripts presumptive evidence of their contents, authorizes them to be read in evidence with the like effect as the original instruments recorded might be if produced. The respondent has argued that the object and proper application of section twenty-one, as contained in the Act of 1851, is only to obviate the necessity of producing the books in Court, giving to transcripts the same effect as evidence as the books, and thus making them only evidence of the fact that there is such a record, but not to prove the contents of the instrument recorded. The language employed gives some color to this argument. The books by being produced might be evidence of the fact of the existence of such a record in the office, and so establish constructive notice to subsequent purchasers, but a deed cannot be read in evidence by simply being produced and without proof of its execution. Literally applied, section twenty-one, as it stands in the law of 1851, could have no practical effect. The copy may be

read with like effect as the original instrument recorded might be if produced. But that instrument could not be read at all simply by being produced, and so the copy could not be read by simply being produced. But the language of the section is too plain to allow us to give effect to the respondent's argument. It is that the copy may be read with like effect as the original instrument recorded, not [213] the original record, could be if produced. But this language gives great weight to the argument that section twenty-one should and can only be applied to copies of instruments authorized by the act to be recorded. By that act no instrument can be recorded unless it has been proved or acknowledged according to law. When such original instrument "is produced," it may be read in evidence without further proof. It cannot be read without proof, but it is accompanied with sufficient evidence of its due execution. The record consists not only of the instrument, but also of the certificate of proof or acknowledgment, and when a copy from the record is produced, it, like the original, is accompanied with sufficient evidence of the due execution of the original. It may therefore be read without violence to the established laws of evidence.

By the interpretation of this section claimed by the appellants, and now given to it by the majority of the Court, a copy of any instrument found in any book transferred from the old Alcaldes' offices to the Recorder's office, may be read in evidence without any proof whatever that it was ever executed. It is true that the instrument, a copy of which was offered in this case, has a certificate of acknowledgment before an Alcalde. But this section does not require any such evidence. The simple fact that the instrument is found on the Alcalde's records is all that is necessary, according to this view, to authorize the copy to be read. If it is now decided that this copy is evidence, there will be no ground upon which any copy from these books can hereafter be excluded. There being no law in force upon the subject at the time these records were made, we cannot assume that any acknowledgment or proof was requisite to enable deeds to be copied into these books; and if the Judges could be allowed to act upon

their personal knowledge, we should be authorized to say that it was common for the Alcalde to copy into his books any instrument for which he was paid the usual fee. If any attempt should be made hereafter to restrict the operation of this section so as only to allow copies to be read of conveyances which should have been acknowledged or proved, it would be impracticable to do so, because this species of evi-

dence of execution is entirely the creature of statute, [214] and there was no statute then in force authorizing it. It has been said that there might have been a custom upon the subject amounting to law. If so, the custom would have to be proved. There was no such custom of which this Court has judicial knowledge. In fact there is no probability that there was any custom allowing instruments to be read in evidence on a certificate of proof before an officer. A practice grew up to record deeds with the Alcalde, proved or not proved, from an opinion that the record would serve as notice of the party's title, but this was quite different from any custom to read deeds in evidence upon a certificate of proof before any person holding any office.

The suggestion that it is necessary to apply section twenty-one of the Act of 1851 to all records in the Recorder's office, in order to authorize copies of deeds recorded under the Act of 1850 to be given in evidence, does not seem to me of weight, because the second act is but a reenactment of the first, and a mere continuation of the registry system; but also because, if the section were entirely out of the act, it would be of no consequence, as the operative law under which these copies are given in evidence is contained in the act concerning conveyances and a law upon the subject passed in 1857.

But if it were necessary to make a merely literal application of this section, and to allow to be read in evidence a copy from any book that by any law is authorized to be kept by the Recorder as a part of his records, then, by the same rule of literal application, copies from the old Alcaldes' books cannot be given in evidence. Literally, the copy can be read only with like effect as the original could be if produced. But no law authorizes a deed to be read on an Alcalde's cer-

tificate of acknowledgment; and so, upon even this restricted view of the application of section twenty-first, the copy offered in evidence was properly excluded.

And if this literal interpretation is to be given to the section, there is another objection to the proof offered. A copy can be read only of an instrument "recorded." It is settled that an instrument copied into the Recorder's books without having been duly proved or acknowledged is not thereby a "recorded" instrument. If such an instrument should be found on the Recorder's books, kept under \*the [215] act, a copy could not be read in evidence, although the book in which it was copied would properly be called and kept as part of the Recorder's records. I can see no sufficient reason for holding that the law, providing that the Recorder should "keep and preserve as part of his records" certain books transferred from an Alcalde's office, intends and means that any instrument found copied into them shall be deemed to be "recorded" in that sense which would authorize a copy to be read in evidence under section twenty-one of the Recorders' Act of 1850, when a copy of such an instrument found in the books kept under the act itself could not be read in evidence, and still less that the amendment made to section twenty-one, in the year after, should have the effect to authorize such a copy from the Alcalde's books to be read in evidence, when a copy of an instrument not duly "recorded," found in the books kept under the act, could not be read.

As a new trial is ordered on this point, it is of no importance in this case to examine any other objections, and I have only given this dissenting opinion upon the point because the question is of general application and of more than ordinary importance.

WELLS v. McPIKE *et al.*

<sup>1</sup> EVASIVE DENIAL OF INDEBTEDNESS.—In answer to a verified complaint in assumption it a denial of the indebtedness merely, without a denial of the facts which show the existence of the indebtedness, is but a denial of a conclusion of law and raises no issue.

EFFECT OF FAILURE TO DENY.—The admission by the Court, under the objection of defendants, of improper evidence offered by plaintiff to prove a fact alleged in his complaint and not denied in the answer is no cause for granting a new trial.

## APPEAL from the Fifth Judicial District.

The complaint avers, that on the twenty-first day of June, 1860, "the said defendants were indebted to the said plaintiff for two hundred and sixty-six head of beef cattle, which were of the value of and for which the said defendants agreed to pay the sum of \$10,010, being at the rate and price of thirty-five dollars each, which cattle had been before that [216] time sold and delivered to the \*said defendants;" that the cattle were delivered some in Utah Territory and some in Stanislaus County; that "being so indebted the defendants afterwards, on the day and year aforesaid, undertook and promised the plaintiff to pay to him the said sum of money when they should be thereto requested;" that only one hundred and ten dollars had been paid, leaving a balance of \$9,900 still due, for which judgment was prayed.

The only denials in the answer are the following: "Defendants for answer to said complaint say, that they were not, nor are not, indebted to said plaintiff as alleged in said complaint; and defendants further deny that they ever promised to pay the said plaintiff the said sum of money specified in said complaint, or any other sum whatever as alleged therein, or that plaintiff ever demanded the same." The answer then proceeds to aver, that the defendants did purchase the cattle of plaintiff, and agreed to pay him thirty-five dollars per head for them, provided that plaintiff would receive in payment a United States Commissary's certificate then held by defendants, which certified that defendants had furnished

<sup>1</sup> See *Smith v. Richmond*, 15 Cal. 501; *Blankman v. Vallejo*, Id. 638; *Castro v. Wetmore*, 16 Id. 380; *Woodworth v. Knowlton*, 22 Cal. 169; *Landers v. Bolton*, 26 Id. 417; *Morrill v. Morrill*, Id. 292; *Camden v. Mullen*, 29 Cal. 564; *Blood v. Light*, 31 Cal. 115; *Doll v. Good*, 38 Cal. 290; *DeGodey v. Godey*, 39 Cal. 157.



to the United States military force in Carson Valley supplies amounting in value to \$9,900, for which they were entitled to receive pay from the Government; that this certificate plaintiff agreed to receive in payment, whereupon, it was by written indorsement assigned to him by defendants in full satisfaction.

Plaintiff replied, denying that the certificate was received in payment, alleging that defendants fraudulently misrepresented to him its character, and offering to redeliver it to them.

All the pleadings were verified.

On the trial, plaintiff rested on the pleadings, and thereupon defendants moved for a nonsuit, which was denied. Defendants then introduced their evidence, after which plaintiff, for the purpose, as was alleged, of rebutting the presumption, arising from defendants' evidence, that the cattle were actually worth less than thirty-five dollars per head, and were purchased at this price only in consideration of the character of the pay, introduced proof tending to show that the cattle were actually worth in cash the price agreed upon. To some of the evidence offered on this point defendants objected, on the ground that it was irrelevant and not proper in \*proof of the point to which it was offered, [217] which objections were overruled and exceptions thereon saved by defendants, and afterward made part of the statement on motion for new trial.

The jury found in favor of plaintiff for the amount claimed in the complaint.

Defendants moved for a new trial, and filed a statement which, as settled, did not contain any of the evidence relating to the original transfer of the Commissary's certificate, but did contain a detailed account of the circumstances occurring on the trial as to an attempted redelivery of that certificate by plaintiff's counsel to defendants.

The Court below denied the motion for new trial, and from this order defendants appeal.

*H. P. Barber*, for Appellants.

I. The nonsuit should have been granted. The action being *indeb. assumpsit*, and a specific denial of the indebtedness and sale being made, the plaintiff was bound to prove his entire case, and could not avail himself of any supposed

admission made by defendants in a subsequent pleading. (*Troy Railroad Co. v. Kerr*, 17 Barb. 581.)

Defendants do not admit or allege any sale, except with the qualification, that what respondent calls a sale was in fact a barter of the cattle for the order on the United States Government; and on the well understood principle that the whole of an admission must be taken together, as plaintiff chose to rest his case on the pleadings alone, a nonsuit should have been granted. While the admission in the answer embraces the receipt of the cattle, it also alleges an accord and satisfaction in payment therefor.

In the case of *Higgins v. Wortell*, referred to in respondent's brief, there is a mere denial of the indebtedness of a specific sum. The answer in this case is a total denial of any indebtedness or of any sale. The appellants' answer, as a whole, shows that nothing is due; that plaintiff had no cause of action, and, therefore, as the case was rested upon the pleadings, defendants were entitled to a nonsuit.

II. It appears from the record that the certificates on the United States Government were duly assigned in [218] writing to plaintiff, as we \*say, in full payment—as they say, only as security. It will be observed that he offered these certificates to us at the trial by merely handing them to defendants. This, of course, was insufficient; for as they were assigned to him in writing, it required a re-assignment to vest the property in us again. (*Middleworth v. Sedgwick*, 10 Cal. 392.)

III. The Court erred in permitting plaintiff to prove the value of the cattle by showing what they cost him, and what was the expense of their keeping between his purchase and the sale to us—this was no proof of their value.

*J. B. Hall*, for Respondent.

I. The nonsuit was properly refused. The general denial contained in the first paragraphs of the answer is insufficient to raise an issue. (*Higgins v. Wortell et al.*, 18 Cal. 330.)

But although effect were given to the denial referred to, it is overcome by the effect of the defendants' own sworn statements in the defense which follows—wherein the sale is admitted, and payment pleaded by means of the account assigned.

II. The redelivery of the Commissary's certificate was sufficient without an assignment in writing. But whether this is true or not, nothing appears in the statement showing that its redelivery to defendants was material.

III. The evidence offered as to value of cattle was proper. The best evidence of their value was their first cost and the expense of delivering them.

NORTON, J. delivered the opinion of the Court—FIELD, C. J. concurring.

It was not error to deny the motion for nonsuit. The answer did not deny the sale of the cattle at an agreed price, which is the cause of action set forth in the complaint. A denial of the indebtedness, without a denial of the facts which show the existence of the indebtedness, is but a denial of a conclusion of law, and raises no issue. But the denial of the indebtedness was not sufficient under the authority of the case of *Higgins v. Wortell*, 18 Cal. 330.

\*The two other objections which are discussed in [219] the briefs do not appear in the record in such a form as to be available to the defendants. A motion was made for a new trial, but not on the ground that the verdict was against the evidence. The plaintiff asks for a new trial because there was no offer to retransfer in writing a certain account, but the statement for a new trial does not show what proofs or, indeed, that any proofs were made at the trial in reference to that account. The facts in regard to this account are brought forward by a special answer, upon which issue is taken by a replication, but it does not appear that any proofs were made by either party on this issue. The statement cannot be used as a bill of exceptions in regard to this point, because it does not appear that there was any ruling made by the Court or any exception upon the subject. In regard to the evidence about the value of the cattle, the trial, as shown by the statement, was singularly conducted. The plaintiff does not appear to have offered any proof of his cause of action, but rested upon the pleadings as he was justified in doing. But at a subsequent stage of the trial he offered proof as to the value of the cattle, although the proof was immaterial, the sale having been for an agreed price. It is probable the parties

treated the complaint as averring a sale for so much as the cattle were worth, instead of an agreed price, although the verdict is for the exact sum agreed to be paid. But, as we have said, under the pleadings the value was immaterial, unless it became so by reason of the proof given on the special issue, and this does not appear by the statement. If the account was taken in satisfaction, as alleged in the special answer, the value was immaterial; and so if taken only as collateral security for the agreed price, the value was immaterial. If the denial of indebtedness could be considered as raising any issue, it does not deny the value.

Judgment affirmed.

[220]

\*CLARK v. LOCKWOOD *et al.*

**EFFECT OF CONFIRMATION OF MEXICAN GRANT.**—A final decree of the United States Courts, confirming a Mexican grant, establishes conclusively the legal title of the grantees to the premises at the date of the presentation of his petition to the Land Commission. And where the confirmer claims in his petition as successor in interest of the original grantee of the Mexican Government by virtue of means conveyances from him, the decree is equally conclusive of the validity of his derivative title as of that of the original grantee.

**NEW TRIAL, WHEN NOT GRANTED.**—A new trial will not be granted on account of the admission of improper evidence to prove a fact not material to the decision of the action, and independent of which the verdict is supported.

**EJECTMENT, LEGAL TITLE TO CONTROL.**—In ejectment the legal title must control. The plaintiff, establishing in himself the legal title, cannot be defeated by showing that such title was acquired by fraud, or is held by him in trust. These are considerations for a Court of Equity, which will control the legal title in his hands so as to protect the just rights of others.

**EJECTMENT—PATENT ADMISSIBLE TO PROVE LOCATION.**—The plaintiff in ejectment claimed title under a decree of confirmation of a Mexican grant, in which the tract confirmed was described as bounded upon the north by the Bernal Rancho, and to prove the position of this northern boundary offered in evidence a patent of the rancho issued by the United States: *Held*, that the patent was admissible, and was *prima facie* evidence of the location of the northern boundary of the tract sought to be recovered.

<sup>1</sup> Cited as authority in *Schmitt v. Geovanini*, April T. 1872 (not reported); *Sempie v. Hagar*, 27 Cal. 168; *Morrill v. Chapman*, 35 Cal. 88; *Leese v. Clark*, 18 Cal. 535; *Teschemacher v. Thompson*, Id. 11; *Seale v. Ford*, 29 Cal. 104; *Hartley v. Brown*, 46 Cal. 204; *Hartley v. Brown*, 51 Cal. 467; *Kentfield v. Hayes*, 57 Cal. 411; *Schmitt v. Giovanari*, 43 Cal. 622.

<sup>2</sup> Equity will control legal title to protect others, cited as authority in *Enerio v. Penniman*, 26 Cal. 124; *Salmon v. Symonds*, 30 Cal. 307; *O'Connell v. Dougherty*, 32 Cal. 462; *Hicks v. Lovell*, 64 Cal. 18.

<sup>3</sup> TITLE OF PURCHASER AT SHERIFF'S SALE, ON WHAT IT RESTS.—The title of the purchaser of real estate at execution sale does not depend upon and is not affected by the Sheriff's return upon the writ of execution. The title rests upon the judgment, execution, sale, and deed, and is not impaired by any defect in the return of the officer, or by his failure to make any return.

APPEAL from the Twelfth Judicial District.

The facts are stated in the opinion of the Court.

*James McM. Shafter*, for Appellants.

*Hoge & Wilson*, for Respondent.

FIELD, C. J. delivered the opinion of the Court—COPE, J. and NORTON, J. concurring.

This is an action of ejectment to recover the possession of certain premises situated in the counties of San Francisco and San Mateo. The plaintiff derails his title from the Mexican Government through a grant issued by Alvarado, Governor of California, to Jacob P. Leese in July, 1841. This grant was presented to the \*Board of [221] Land Commissioners for confirmation by Henry R. Payson, who alleged in his petition that he claimed the greater part of the land described therein under the grantee by various mesne conveyances, which he designated. The claim of the petitioner was confirmed by the Board in January, 1855, and afterwards on appeal by the United States District Court in June, 1856. In April, 1857, the Attorney-General notified the District Attorney that an appeal would not be prosecuted by the United States, and upon a stipulation to that effect by the latter officer, the District Court entered an order giving leave to the claimant to proceed upon its decree as upon a final decree. The effect of the decree of the District Court thus rendered final was to establish the validity of the grant to Leese, and of the title of the claimant to that portion of the premises granted which he claimed in his petition. The decree was an adjudication, binding upon the Government and parties claiming under the Government,

<sup>3</sup> Cited as authority in *Moore v. Martin*, 38 Cal. 438; *Blood v. Light*, 38 Cal. 654; and see *San Francisco v. Pizley*, ante 59; and *Gonubette v. Brock*, Jan. T. 1871 (not reported.) *Hibberd v. Smith*, 67 Cal. 565.

that the title to the premises claimed was in the claimant at the presentation of his petition to the Land Commission, at which date the decree took effect by relation. The deed from the claimant to the plaintiff, pending the proceedings for confirmation, passed therefore the title, thus adjudicated, to one undivided fourth of the premises; and upon its introduction with the petition and final decree, the plaintiff might have rested his proof as to his title, and confined his further proof to the determination of the boundaries of the land, and of the question whether the defendants were in its occupation at the commencement of the action. Assuming that the defendants were shown to be within the boundaries established, the plaintiff was entitled to recover. (*Estrada v. Murphy*, 19 Cal. 272; *Toucharl v. Crow*, 20 Id. 160.) The plaintiff did not, however, rest with the proof we have mentioned. He proceeded to prove the grant issued to Leese, and the several intermediate conveyances from the grantee to him. He also produced another and distinct series of conveyances, commencing with the grantee and ending with himself, together with some evidence as to his prior possession. In making this proof several days of the trial were occupied, and numerous and sometimes difficult questions were presented for consideration. And it is principally upon exceptions to [222] the rulings of \*the Court upon these questions that the defendants rely for a reversal of the judgment. These exceptions cannot, however, be of any avail to them, even if it be admitted that the Court below erred in its disposition of some of the questions raised. The proof was entirely immaterial, and whether properly or improperly admitted, could not have changed the result. The decree of the United States District Court, rendered final upon the stipulation of the counsel of the Government, was absolutely conclusive, in the present action, as to the title of the conferee, and could neither be strengthened by the addition of the proof offered, nor weakened by its exclusion. The petition of the claimant, as the basis of the action of the Land Commission and of the United States District Court, and as indicating the nature of the claim asserted, was properly admitted in connection with the final decree, but no further proof than this decree was necessary to establish the existence or

genuineness of the grant to Leese which was described in the petition, or of any intermediate conveyances to the claimant. The confirmation inured to the benefit of the confirmee, and those claiming under him, however obtained, and, until set aside, the decree was conclusive as to his title in this action of ejectment. The confirmation, as we said in *Estrada v. Murphy*, "establishes the legal title in the confirmee, and this must control in the action of ejectment. If the confirmee, in presenting his claim, acted as agent, or trustee, or guardian, or in any other fiduciary capacity, a Court of Equity, upon a proper proceeding, will compel a transfer of the legal title to the principal, *cestui que trust*, ward, or other party equitably entitled to the same, or subject it to the proper trusts in the confirmee's hands. It matters not whether the presentation were made by the confirmee in his own name in good faith, or with intent to defraud the actual owner of the claim; a Court of Equity will control the legal title in his hands so as to protect the just rights of others. But in ejectment the legal title must control." (19 Cal. 272.)

Upon this view of the title the only matters, which could be properly left to the consideration of the jury, related to the boundaries of the premises and the possession of the defendants. The decrees of the Commission and of the District Court both give specifically \*the boundaries [223] of the tract granted to Leese, and both describe the portion which was excepted and reserved from the confirmation as having been previously confirmed by a decree of the Commission to another claimant. The boundaries given of the tract are as follows: On the *east*, the waters of the bay of San Francisco; on the *west*, the Camino Real and the Portezuela; on the *north*, the land known as the rancho of Cornelio Bernal; and on the *south*, the land known as the rancho of José Sanchez. The location of the western boundary was clearly fixed by the evidence. To establish the position of the northern boundary a patent of the United States for the Bernal Rancho was introduced in evidence. This patent gave with great particularity the boundaries of the tract it embraces—stating the different courses they run, and the links and chains of each course. It fixed with absolute precision the southern line of the tract, and was therefore *prima facie*

evidence of the location of the northern boundary of the land granted to Leese. We say it was *prima facie* evidence; it may have been more than this—it may have been conclusive evidence. Its effect as evidence depended principally upon the character of the grant to Bernal; whether that were one of a certain quantity only, lying within outer boundaries embracing a larger tract, or one of specific land with defined boundaries. If the grant were of the first kind, the boundaries of the quantity designated, after its segregation by survey and measurement from the whole tract, *may* have been very different from the outer boundaries of the grant. If, on the other hand, the grant were of the second kind—that is, of specific land with defined boundaries, the official survey and measurement must have resulted in the simple identification of those boundaries; and the patent of the United States, giving their location with precision, would have been conclusive evidence of the position of the northern boundary line of the adjoining grant to Leese. In the present case there was nothing to show the character of the grant to Bernal; but the presumption is that the boundaries which it gave corresponded with those adopted by the United States in the patent following the confirmation. The patent was therefore *prima facie* evidence of the location of the designated northern boundary, to establish which it was introduced; [224] and as there was nothing \*shown to rebut this *prima facie* evidence, it was for the purposes of the action conclusive.

To establish the location of the southern boundary line, the plaintiff introduced in evidence an official survey of the rancho of Sanchez—known as the Buri Buri Rancho—made under the directions of the Surveyor-General of the United States for California by one of his deputies, and also a record of juridical possession of the land delivered to the grantee in 1835. It is unnecessary to consider the objections taken to the evidence furnished on this head, as it did not bear upon any rights asserted by the defendants who have appealed from the judgment. There are over twenty defendants to the action, of whom only four are appellants; and of these, two are tenants of the other two. The land which the latter two occupied is situated several miles from the disputed southern



line of the premises in controversy; and there was no location suggested even of that line which did not include their possessions. The numerous exceptions taken by other defendants to the evidence offered cannot, therefore, aid the appellants.

Of the several instructions to the jury requested by the defendants, and refused by the Court, counsel alleges error only in the refusal of one. Of the mesne conveyances, through which the confirmer, Payson, deraigned his title from the grantee, Leese, one was executed by the Sheriff upon a sale under a judgment and execution of the District Court; and the instruction asked, if we understand its purport, was to the effect that if the property, according to the description in the Sheriff's return on the execution, differed from the property described in the Sheriff's deed and the decree of the United States District Court, the deed did not pass the property in controversy. The instruction is awkwardly expressed, but the proposition which it advances, is that the Sheriff's deed is inoperative to pass any property except that which is described in his return. The proposition as thus stated is not sound in itself, and if it were sound is inapplicable to the case at bar. The title of the purchaser does not depend upon the return of the Sheriff. It rests upon the judgment, execution, sale, and deed. There may in fact be no return, or it may be defectively made. "The purchaser," as we said in *Cloud v. El Dorado County*, "has \*no control over the conduct of the officer in [225] this respect, nor is it just or reasonable that he should be responsible for the remissness or negligence of the Sheriff in the discharge of such an office." (12 Cal. 133.) But even if the law were otherwise it could not be invoked to defeat a recovery in the present case. The final decree of confirmation settled the question as to the effect of that conveyance, and determined that the legal title to the premises was in the confirmer. In the action of ejectment this operation of the decree cannot be questioned. This latter consideration also disposes of the exception taken to the instruction, given at the request of the plaintiff, upon the nature of that partial or particular possession, from which a constructive possession of an entire tract is inferred.

Judgment affirmed.

## HICKMAN v. ALPAUGH.

<sup>1</sup> **LAW OF PLACE PRESUMED.**—Where the validity of a sale made in a foreign State is drawn in question in the Courts of this State the law of the place of contract will be presumed, until the contrary is shown, to have been the same as that of our own State in reference to the same subject matter. This presumption extends to statutory as well as to the common law.

<sup>1</sup> **IDEM—VALIDITY OF SALE HOW DETERMINED.**—Thus, where in an action in a District Court of this State, an issue was raised as to whether a sale of personal property made in Oregon was fraudulent, and no proof was made of the laws of Oregon: *Held*, that the validity of the sale must be determined by the common law and statutes in force in this State on the subject.

**APPEAL from the Fifteenth Judicial District.**

The defendant, who was Sheriff of Tehama County, having process in his hands against the property of one Farrens, seized under this process certain cattle which were in the possession of the plaintiff, and for the recovery of this property, with damages, the action is brought. The defense set up in the answer is, that the cattle were the property of Farrens, and were obtained by plaintiff under a fraudulent sale made to him by Farrens for the purpose of [226] \*defeating the creditors. It appeared from the evidence that the sale alleged to be fraudulent was made in the State of Oregon. No proof of the laws of Oregon was made on the trial. Under the instructions of the Court set forth in the opinion the jury found for the plaintiff. Defendant moved for a new trial, which was denied, and from this order and the judgment he appeals.

*W. H. Rhodes*, for Appellant.

By the laws of California, as well as by common law, a sale or assignment made for the purpose of defrauding creditors, if such object be known and concurred in by the vendee, is absolutely void. (Wood's Dig. 107.) By the comity of Courts of Justice, it is a rule of common law that the statutory laws of the State or country in which a cause of action arose, or in which the act was done, that is the subject of litigation, are presumed to be the same as the statutory laws of the forum, until the contrary affirmatively appears.

<sup>1</sup> Presumption as to State laws, cited as authority in *Hill v. Grigsby*, 32 Cal. 60; *Masters v. Lash*, 61 Cal. 624. See 15 Kan. 285.

(*Norris v. Harris*, 15 Cal. 252, and authorities there cited; *Robinson v. Dauchy*, 3 Barb. S. C. 29, and authorities cited; *Hoffman v. Carew*, 22 Wend. 322-324.)

*W. S. Long*, for Respondent.

NORTON, J. delivered the opinion of the Court—FIELD, C. J. concurring

On the trial of this action the Court gave the following charge to the jury: "The sale relied upon by the plaintiff, Hickman, of a portion of the property in controversy from N. J. Farrens to him took place in Oregon, and without the jurisdiction of the State of California, and, therefore, the said sale cannot be attacked by the defendant in this cause for an actual or legal fraud provided for by the statute of California relating to fraudulent conveyances." This charge was erroneous. There was no proof made as to the laws of Oregon, and in the absence of such proof the Court should have presumed them to be the same as the laws of our own State. This rule applies to the statute law of the State as well as to the common law. (*Norris v. Harris*, 15 Cal. 253, 254, and cases there cited; *Leavenworth v. Brockway*, 2 Hill, 201; *Robinson v. Dauchy*, 3 Barb. 20; *Hoffman v. Carew*, 22 Wend. 322-324.) [227]

For this error the judgment must be reversed and the cause remanded.

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## WILLIAMS v. YOUNG.

<sup>1</sup> **VENDOR'S LIEN.**—A vendor's lien, after absolute conveyance, is not a specific absolute charge upon the property, but only an equitable right of the vendor to resort to it in case the purchase money is not paid.

<sup>1</sup> **IDEM—CANNOT BE ASSIGNED.**—It is a right which can only be asserted by one who has parted with his property. It is the personal privilege of the vendor, given solely for his security, and is in its nature unassignable. *Baum v. Grigsby*, ante 172, affirmed.

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<sup>1</sup> Cited as authority in *Ross v. Heintzen*, 36 Cal. 321. See *Lewis v. Covillaud*, ante 178.

## APPEAL from the Ninth Judicial District.

The facts of this case are briefly as follows: In October, 1854, one Harrell sold and conveyed the premises described in the complaint to one B. B. Young, then the husband of the defendant, for the consideration of eight hundred dollars—two hundred dollars of which were paid in cash, and for the balance two promissory notes of the grantee were given, payable to the order of Harrell. These notes were immediately indorsed over to the plaintiff. On the second of July, 1857, there remained due on the notes the sum of three hundred and ninety-one dollars. On that day, the plaintiff loaned to Young the further sum of five hundred and nine dollars, and took his note for both amounts, namely: nine hundred dollars, payable in six months, with interest at two and one-half per cent. a month. Upon this note plaintiff obtained a judgment against Young in September, 1858, but never collected anything upon it. Young died in April, 1859, leaving the defendant surviving him. The present action is brought to subject the premises to sale for the payment of three hundred and ninety-one dollars of the note—the amount remaining unpaid of the purchase money, which formed a part of it, with interest; the plaintiff basing his right to this relief upon the alleged ground that he held a vendor's lien for the same upon the premises. The Court decided that the [228] plaintiff held a \*lien, and gave judgment for the sale of the premises, and the application of the proceeds to the satisfaction of the amount due of the purchase money. From this judgment the appeal is taken.

*Jas. D. Mix*, for Appellant.

*R. T. Sprague*, for Respondent.

FIELD, C. J. delivered the opinion of the Court—NORTON, J. concurring.

This case is covered by the decision recently rendered in *Baum v. Grigsby*. The plaintiff seeks to enforce a vendor's lien upon the premises described in the complaint as assignee of a portion of the unpaid purchase money. Such lien, as we have held in the decision mentioned, is not a specific

absolute charge upon the property, but only an equitable right of the vendor to resort to it in case the purchase money is not paid. It is a right which does not spring from any agreement of the parties, but is the mere creature of a Court of Equity. It rests upon the natural justice of permitting the vendor to subject the property, which he has transferred, to the payment of the debt which constitutes the consideration of the transfer, there being no distinct and independent security taken for such debt. It is an equitable right which can be asserted only by one who has thus parted with his property. It is, therefore, the personal privilege of the vendor, given solely for his security, and is in its nature unassignable. (See cases cited in *Baum v. Grigsby*.)

It follows that the judgment of the District Court must be reversed, and that Court directed to dismiss the action; and it is so ordered.

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\*PLAYTER v. CUNNINGHAM.

[229]

**COVENANT FOR QUIET ENJOYMENT.**—Upon a covenant in a lease for quiet enjoyment the lessor is responsible only for his own acts and those of others claiming by title paramount to the lease and not for the acts of a mere trespasser, although the effect of these acts may be to deprive the lessee of the benefit of the lease.

**IDEM—COMPLAINT INSUFFICIENT.**—Thus, where a lessor was sued upon a covenant "that the lessees paying the rent shall peaceably and quietly have, hold, and enjoy the premises for the term mentioned," and the breach alleged was that the lessee had been prevented from entering by one R. who was in possession *claiming to hold under a prior lease*: *Held*, that the complaint was demurrable in failing to aver any sufficient breach of the covenant.

**IDEM—COMPLAINT SUFFICIENT.**—*Held, further*, that if the complaint had averred that R. was in possession, *actually holding under a superior title*, it would have been sufficient without alleging that a suit had been brought and the validity of the title judicially determined.

APPEAL from the Twelfth Judicial District.

The facts are sufficiently stated in the opinion of the Court.

*Shattuck, Spencer & Reichert*, for Appellant.

A covenant in a lease for quiet enjoyment implies a quiet

Cited, 65 N. Y. 508.

entering into possession under the lease, and not a lawsuit. (*Coy v. Clay*, 5 Bing. 440; *Ludwell v. Needman*, 6 Term, 458; *Trull v. Granger*, 4 Seld. 115; *Lawrence v. French*, 25 Wheat. 445; *Duvall v. Craig*, 2 Id. 61.)

In *Ludwell v. Needman*, above cited, the Court think it extremely clear "that the defendant's covenant for quiet enjoyment meant a legal entry and enjoyment without the permission of any other person."

There were in this case two counts in the complaint, in one of which it was alleged that suit had been prosecuted against the occupant without recovery. The second count did not state an application to the occupant to attorn or a suit against him. The same plea was interposed to both the counts, and a demurrer to the plea. While the facts of the case are somewhat variant from this, yet the principle announced is correct, and sustains us.

The counsel for respondent relies mainly upon the case of *Gardner v. Keteltas*, 3 Hill, 330, which seems to hold that the lessee cannot recover damages against his lessor for not letting him into the possession, if he could maintain ejectment against the incumbent.

[230] \*But the case of *Trull v. Granger*, above cited, is a later case than that in 3 Hill, and was decided by a higher Court. The former case is quoted, and the later decision is against it, maintaining as it does that, although the tenant may have cause of action against the occupants of the household as a wrong-doer, yet he is not driven to that, but may recover damages against the lessor on the covenant for quiet enjoyment.

It will be seen, in *Trull v. Granger*, that Trull had the oldest lease, dated September, 1849, to commence in May, 1850. On the first of May, 1850, plaintiff tendered the rent and demanded possession, but the premises subsequent to plaintiff's lease, viz., March, 1850, had been let to another who was then in possession, and as a wrong-doer against Trull. That Trull could have ejected him is undoubted, but that is not the question. The question made and decided was, that the tenant was entitled to be let into possession without suit, or an action for damages lay against the landlord. And all the Judges who heard the case concurred.

The other cases relied on by counsel for respondent are of a class concerning those who have purchased the fee, or a very long lease, where the doctrine is asserted, that if the owner had the right to sell at the time he executed the instrument, a tenant holding over and refusing to give possession would not make the vendor liable to the vendee. Such is the case of *Howell v. Richards*, 11 East. 63, and others cited by respondent.

Authorities bearing immediately on the point seem not to be numerous; what there are, with the exception of that in 3 Hill, are in our favor.

Indeed, the justice of the principle contended for by us seems so clear as to need no authority to sustain it. This case is a good illustration of it. The premises are extensive warehouses in San Francisco; the rent eight hundred dollars per month; the term one year. To make preparation to enter upon the business profitably, time is important. Hence, the lease was obtained some months before it commenced running, to give the lessee opportunity of shaping his business to that end. He is prepared and the time has arrived; his money is tendered and possession is demanded, only to be told that he has the poor privilege of suing Reed, the incum-bent, who claims to hold under an older [231] and better title than that of plaintiff. Should he sue, his lease would probably expire before the right of possession could be determined; in the meantime he would have paid to his landlord \$9,000 rent with the expense and vexation of a lawsuit added thereto. If he fails in the suit, it is a loss of the whole with his year's business. If he recovers, his year's business is lost and Reed may be utterly unable to respond in damages, and he has lost \$10,000, besides his time, to test the right of possession of a former tenant of his landlord. This is not justice, and cannot be law.

*Delos Lake*, for Respondent.

I. A covenant for quiet enjoyment only insures the lessee a legal right to enter under the lease and enjoy the demised premises, but is not a guaranty against damage caused by a wrong-doer who may happen to be in possession.

II. The lease in this case was a conveyance of a term;

and the covenant for quiet enjoyment operated as a warranty by the lessor that he had lawful right to convey the term, and is not broken except by paramount adverse title to some portion of the term. It is a covenant against the right of all persons lawfully claiming title or possession under the lessor. It is not a covenant against the unlawful acts of strangers. (*Dudley v. Folliott*, 3 Durn. & E. 584; *Platt on Covenants*, 314; *Ludwell v. Newman*, 6 Durn. & E. 458; *Howell v. Richards*, 11 East, 633; *Woodfall's Landlord and Tenant*, 232; *Gardner v. Keteltas*, 3 Hill, 330.) This last case is on all fours with the present, and is not overruled by the case of *Trull v. Granger*, 4 Alden, 115, as the plaintiff's counsel erroneously supposes.

In this latter case the landlord personally withheld and retained possession. No one ever doubted that such act by the landlord was a breach of the covenant of quiet enjoyment—as much so as to enter upon and take possession of a part of the demised premises during the term. It is simply the difference between the wrongful acts of the landlord, for which he is responsible, and the wrongful acts of a stranger, for which the landlord is not answerable.

[232] \*The only case that in the least conflicts with the proposition for which we contend, is that of *Coy v. Clay*, 5 Bing. 440, cited in plaintiff's brief. (15 E. C. L. 493.) This case is so briefly reported that it is not much to be relied on as an authority. So far as the facts are reported, however, it is not necessarily in conflict with previous cases. It is stated to be "an agreement to let the plaintiff certain premises *per verba de præsenti*; which I understand to mean not only that the words of grant were in the present tense but that it was a grant of a *present right of enjoyment*. Otherwise, there was no necessity of stating, *ex industria*, that the agreement was *per verba de præsenti*, since all leases contain words of grant in the present tense though the term may commence in the future. The lease under consideration is, by deed, to take effect *in futuro*. But whether this distinction is well founded or not, this brief case, loosely reported, cannot be permitted to overcome the otherwise uniform current of decisions founded on the clearest principles.



COPE, J. delivered the opinion of the Court—FIELD, C. J. and NORTON, J. concurring.

In April, 1860, the defendant executed to the plaintiff and one Berring a lease of certain premises in the city of San Francisco, for one year, commencing on the first of August. Berring assigned his interest to the plaintiff, and at the proper time the plaintiff tendered the rent and demanded possession of the premises, but was prevented from entering by one Reed, who was in possession, claiming to hold under a prior lease. The action is brought upon a covenant in the lease for quiet enjoyment, and the question is, whether the defendant was bound by the covenant to put the plaintiff in possession. The case comes up on demurrer to the complaint, the Court below having sustained the demurrer, and rendered a judgment for the defendant.

The language of the covenant is, that the lessees paying the rent shall peaceably and quietly have, hold, and enjoy the premises for the term mentioned. This is the form usually adopted in such cases, and there is no doubt that a covenant of this character \*insures to the lessee a [233] legal right to enter and enjoy the demised premises. The plaintiff contends that it amounts to an undertaking that the lessee shall be permitted to enter quietly and without suit, and that it devolves upon the lessor to remove any obstruction to his entry by putting him in possession. The defendant contends that it only implies a legal right to enter, and is not a guaranty against damages resulting from the wrongful act of a third person who may happen to be in possession. This we regard as the correct view; and although the authorities are not entirely uniform, we understand the law upon the subject to be perfectly well settled. (Taylor's Landlord and Tenant, 147; Rawle on Covenants for Title, 147.) The lessor is responsible upon the covenant for his own acts, and for the acts of others claiming by title paramount to the lease, but he is not responsible for the acts of a mere trespasser. The effect of these acts may be to deprive the lessee of the benefit of the lease, but the remedy is against the person by whom the acts were committed, and not against the lessor.

If it were averred that Reed was in possession, actually holding under a superior title, the complaint would probably be sufficient, without alleging that a suit had been brought, and the validity of the title judicially determined. It is not enough, however, to have averred that he was in possession, claiming to hold under a prior lease, for it was necessary to show that the plaintiff had been kept out by means of a paramount title.

Judgment affirmed.

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### WHITNEY v. ALLEN *et al.*

**UNDERTAKING ON APPEAL, EFFECT OF.**—An undertaking on appeal conditioned for the payment of what the judgment creditor has no legal right to receive is not, as to such condition, binding upon the sureties.

**MORTGAGOR IN POSSESSION, LIABILITY OF.**—After a decree foreclosing a mortgage, the mortgagor in possession is not, until a sale is made under the decree, accountable either for rents or for use and occupation, and is subject to no liability, except that he may be restrained from the commission of waste.

[234] **RENTS AND PROFITS PENDING APPEAL.**—\*Where an appeal is taken from a decree foreclosing a mortgage by the mortgagor who is in possession of the premises, the statute does not require an undertaking on appeal, binding the appellant to account to the plaintiff for the rents, or the value of the use and occupation of the premises, pending the appeal.

<sup>1</sup> **IDEM—INTENTION OF STATUTE.**—The provision in section three hundred and fifty-two of the Practice Act in regard to use and occupation refers to cases in which the creditor is entitled to the use, and more particularly to judgments and orders directing a delivery of possession. It was not intended by this section either to increase the liability of the debtor or to subject the sureties to a liability greater than that of the principal.

**UNDERTAKING—LIABILITY OF SURETIES.**—Plaintiff obtained a judgment foreclosing a mortgage against B., the mortgagor, who was in possession, from which B. appealed, and to perfect the appeal and stay proceedings gave an undertaking, with defendants as sureties, conditioned, among other things, that if the judgment should be affirmed, B. would pay to plaintiff the value of the use and occupation of the premises pending the appeal. The judgment having been affirmed, and no sale of the property having been made, the present action was brought against the sureties to recover the value of the use and occupation between the date of the undertaking and the affirmance of the judgment: *Held*, that the undertaking, in reference to use and occupation, was not required by the statute, and that the sureties were, therefore, not liable.

### APPEAL from the Seventh Judicial District

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<sup>1</sup> Cited as authority in *Englund v. Lewis*, 25 Cal. 354.

The complaint states that Whitney, the plaintiff, commenced an action against one Buckman to foreclose a mortgage executed by the latter upon certain premises of which he was in possession, and on the seventeenth day of February, 1859, obtained a decree of foreclosure; that Buckman appealed from this decree, and to perfect the appeal and stay proceedings, filed an undertaking, executed by the present defendants, Allen and Baggs, as sureties, in which, after the usual recitals, they undertook, in the sum of eight hundred dollars, "that during the possession of said mortgaged property by the appellant, he will not commit any waste thereon, and that if the judgment be affirmed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of the possession thereof pursuant to the judgment or order of said (appellate) Court," and that appellant should pay such costs and damages as might be awarded; that the proceedings were stayed by this bond, and the judgment subsequently affirmed; that Buckman, pending the appeal, retained possession, and that the value of the use and occupation was five hundred dollars, which had been \*demanded by plaintiff from Buckman, but had not [235] been paid, either by him or defendants; that defendants are liable for this sum on their undertaking, for which judgment is prayed.

To this complaint defendants demurred, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and defendants answered, and a trial was had before a referee, resulting in a judgment for plaintiff.

A motion for a new trial having been made and denied, defendants appeal from this order and from the judgment.

*Howell & Hopkins*, for Appellants.

The Court erred in overruling the demurrer. The complaint shows this to be an action to recover for use and occupation, or rents and profits (which we deem synonymous terms.) It also shows that plaintiff was not the owner nor claimant of the premises, but that he only held a mortgage lien thereon for the payment of the judgment appealed from. In other

words, he claimed interest on his debt and the rents and profits of the mortgaged premises also.

This Court have long since decided that a mortgage passes no title, but operates only as a security, and follows the debt; and in the case of *Clark v. Boyreau*, 14 Cal. 637, and also in *Yount v. Howe*, Id. 465, the Court in substance say, that no action for rents and profits (or use and occupation?) can be maintained for any period anterior to the date of purchase under a Sheriff's sale. Then, by what right does the plaintiff claim to recover both interest on his debt and the rents under this mortgage? The language of the bond is: "That appellant will not commit waste, and will account for the use and occupation from the appeal till the surrender of the possession." Surrender of the possession to whom? Why to the owner, of course. Then, who is the owner? Not the plaintiff, but the appellant, for whom the defendants became surety. The three hundred and fifty-second section of the Practice Act (the section relied on for recovery) will warrant no such absurd conclusion. It was only intended to apply to actions for the recovery of land *eo nomine*—else, if to recover the rent, why the necessity for foreclosure and sale, if the mortgagee is entitled to the rents and profits before sale?

[236] \**A. Thomas and Wallace & Newell*, for Respondent.

COPE, J. delivered the opinion of the Court—FIELD, C. J. and NORTON J. concurring.

This is an action upon an undertaking on appeal from a judgment of foreclosure. The undertaking provides, among other things, that if the judgment be affirmed the appellant shall pay the value of the use and occupation of the premises from the time of the appeal. Proceedings upon the judgment were stayed until the appeal was determined, and the question is, whether the sureties are bound for the value of the use and occupation during its pendency. Section three hundred and fifty-two of the Practice Act, in pursuance of which the undertaking was executed, reads as follows: "If the judgment or order appealed from direct the sale or delivery of possession of real property, the execution of the same shall not be stayed, unless a written undertaking be executed on the part of the appellant, with two or more sureties. to the effect, that

during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, pursuant to the judgment or order, not exceeding a sum to be fixed by the Judge of the Court by which the judgment was rendered or order made, and which shall be specified in the undertaking. When the judgment is for the sale of mortgaged premises and the payment of a deficiency arising upon the sale, the undertaking shall also provide for the payment of such deficiency." Whether the sureties are bound as contended for depends upon the construction to be given to this section; and to ascertain the intention of the Legislature it is necessary to consider the nature of the judgment and the effect of other provisions of the act. The judgment was simply a judgment of foreclosure, giving no right to the possession of the property, or to the rents and profits, or the value of the use and occupation. The right to possession was contingent upon a sale and the execution of a deed; but the act provides that a purchaser from the time of the sale, etc., shall

\*be entitled to the rents, or the value of the use and [237] occupation. Until a sale has been made, the debtor may remain in possession without being accountable either for rents or for use and occupation, and subject to no liability except that he may be restrained from the commission of waste. The Legislature could not have intended that in case of an appeal the liability of the debtor should be increased, and it would be unreasonable to suppose that the intention was to require an undertaking subjecting the sureties to a liability greater than that of the principal. Our opinion is, that the provision in regard to use and occupation must be understood as referring to those cases in which the creditor is entitled to the value of the use, and that an undertaking to pay what the creditor has no legal right to is not binding upon the sureties. The section includes orders as well as judgments, and the provision in question applies more particularly to judgments and orders directing a delivery of possession.

Judgment reversed, and cause remanded for a new trial.

## FALL *et al.* v. THE COUNTY OF SUTTER *et al.*

**FRANCHISES GRANTED BY POLITICAL POWER.**—Franchises for erecting toll-bridges, or ferries, being sovereign prerogatives, belong to the political power of the State, and are primarily represented and granted by the Legislature as the head of the political power.

**IDEM—POWER WHEN DELEGATED.**—Where the power of granting these franchises has been by legislative enactment delegated to subordinate tribunals, as in this State to the Courts of Sessions and Boards of Supervisors, such tribunals are only agents of the Legislature in this respect.

**IDEM—GRANTS MADE BY SUBORDINATE TRIBUNALS.**—Grants made by these subordinate tribunals by virtue of the authority thus delegated, are equally valid as if made by the Legislature directly, and the effect of a grant by them is to give a right of property to the grantee or licensee which it is not in the power of the Legislature to divest or transfer to another, so long as the owner holds in obedience to law.

**IDEM—GRANTS NOT EXCLUSIVE.**—Grants of franchises of this character, not being exclusive in their terms, do not confer upon the grantees any exclusive right to the line of travel which is accommodated by them, or to its profits, and do not estop the granting power from making other grants of like character, the effect of which is to impair the value and take away the profits of the franchise first granted.

<sup>1</sup> **IDEM**—Where the grant of such franchises is not in terms exclusive, the Government \*holding this power, to be exercised for the public interest and convenience, is not to be presumed to part with its right to make other grants which may impair the value of the first, and will not be held to have done so except where such an intent appears affirmatively and plainly. This intent is not shown from a mere grant of the franchise or privilege.

**IDEM—BRIDGES AND FERRY FRANCHISES.**—The provisions of the Acts of 1850 and 1855, concerning bridges and ferries, prohibiting the subordinate granting tribunals from licensing a second bridge or ferry within one mile of a former one, except under certain conditions, one of which is where a second grant is required by the public convenience, impose no restrictions upon the power of the Legislature in making other grants.

**PUBLIC CONVENIENCE A POLITICAL QUESTION.**—The question of what the public convenience requires, is a political not a legal one. Its decision rests with the Legislature and depends upon its discretion, the exercise of which, in the granting of a subsequent franchise, is conclusive and not reviewable in a Court of Justice.

**IDEM—TOLL-BRIDGES.**—Under the Act of 1850 concerning public ferries, the plaintiffs, in 1852, obtained from the Court of Sessions of Yuba County, a license to construct and maintain a toll-bridge across the Feather River, at a point near the city of Marysville, and constructed and have since maintained, at the point indicated, a bridge sufficient to accommodate the line of travel, and have complied with all the provisions of the law regulating franchises of this character. In 1859 the Legislature by special act granted to the defendants the privilege of constructing another bridge within six hundred feet of that of plaintiffs, and calculated to accommodate the same line of travel, and to impair greatly the profits and value of plaintiffs' franchise. Defendants having commenced the construction of a bridge under this act, plaintiffs brought this action to enjoin its completion and its use for the purpose intended: *Held*, that plaintiffs were not entitled to the injunction.

<sup>1</sup> Commented on and approved in *Bartram v. Central T. Co.*; and *Same v. Ogilby*, 25 Cal. 288; and *State Tel. Co. v. Alta Tel. Co.*, 23 Cal. 423; and *People v. S. F. & A. R. R. Co.*, 35 Cal. 606.

## APPEAL from the Tenth Judicial District.

In 1850 the Legislature passed an act concerning public ferries, by which the Courts of Sessions of the several counties were authorized, upon proper application, to establish ferries, and to license the applicants to receive tolls fixed in amount by the Court, upon complying with the provisions of the act. Section five of the act was as follows: "No ferry shall be established within one mile immediately below or above a regular established ferry, unless it shall be deemed important for the public convenience, or where the situation of a town, or village, the crossing of a public highway, or the intervention of some creek, or ravine, shall render it necessary."

Under this act the plaintiffs, in 1852, obtained a license to build a bridge across the Feather River, near the city of Marysville, and to take tolls thereon for the period of twenty years. The bridge was constructed, and the plaintiffs have since complied with the provisions of the law [239] in all respects as to its maintenance. In 1855 another act was passed giving the authority to establish toll-bridges and ferries to the Supervisors of the several counties, and regulating the mode in which licenses should be given and renewed and the tolls fixed, and prescribing the duties of the licensees—the regulations applying to those already in existence under the old act as well as to those to be established under the new. Section six of this act reenacts section five of the Act of 1850, and provides further, that any application to establish a bridge or ferry within one mile of a bridge or ferry already established, shall be made to the same Board by which the first was established, and upon notice to its owners.

The nature of this action, the character of the complaint, and the subsequent proceedings, are sufficiently set forth in the opinion of the Court. At the January Term, 1861, the Supreme Court affirmed the judgment of the lower Court, Baldwin, J. delivering the opinion, and Cope, J. concurring, which opinion is the one given below. A rehearing was subsequently granted, the argument upon which was postponed from time to time, until the present term when, after

reargument, the judgment was again affirmed, and the previous opinion adopted, by Cope, J.—Norton, J. concurring.

*S. Heydenfeldt*, for Appellants.

I. The remedy by injunction is preventive, and plaintiff is not required to wait until the injury is complete. (2 Story's Eq. secs. 925-928; *Bonaparte v. Railroad Co.*, 1 Baldwin, 205, 212, 216, 230-232; *Ostborn v. U. S. Bank*, 9 Wheat. 738-741, 754, 838-841; *Gibson v. Smith*, 2 Atkyns, 182; *Jackson v. Cator*, 5 Ves. 688; *Hill v. Miller*, 3 Paige, 254; *Whitehuste v. Hyde*, 2 Atk. 391; *Coats v. Clarence Railway*, 1 Rus. & Myl. 181; *Sutton v. Montford*, 4 Simmons, 559; *Back v. Stacy*, 2 Russell, 121; *M. & H. R. Co. v. Archer*, 6 Paige, 83; *Belknap v. Belknap*, 2 Johns. Ch. 463; *Bathurst v. Barden*, 2 Bro. Ch. 64; *Robertson v. Pittenger*, 1 Green's Ch. 57; *Quackenbush v. Van Riper*, 2 Id. 353; *Case v. Harwod*, 3 Wend. 632; Cooper's Eq. 77.)

II. Standing by and seeing a party expend money would exclude title to relief. (*East I. Co. v. Vincent*, 2 Atk. [240] 83; *Styles v. Cooper*, 3 Id. 692; *The King v. Butierton*, 6 Term, 554; *Jackson v. Cator*, 5 Ves. 688; *Birmingham Coal Co. v. Lloyd*, 18 Id. 515; *Lynn v. Pemberton*, 1 Swamt. 246.) And no damages given for violating franchise for the same reason. (*Newburg Turnpike Co. v. Miller*, 5 Johns. Ch. 115.)

III. The public convenience, or some one of the statute exceptions, is a condition which must be shown. (*Commonwealth v. Egremont*, 6 Mass. 491; *Commonwealth v. Chase*, 2 Id. 170; *Commonwealth v. Cummings*, Id.; *Givens v. Pollard*, 3 A. K. Marshall, 320; *Casey & Finnie v. Jones*, 2 Littell, 301; *Nashville B. Co. v. Shelby*, 10 Yerger, 280; *Coffver v. Houston*, 4 Munroe, 288; *In re Hanson*, 2 Cal. 262.)

IV. Exclusive rights are always protected. (*Newburg Turnpike Co. v. Miller*, 5 Johns. Ch. 111; *Croton Turnpike v. Ryder*, 1 Id. 611; *Norris v. The F. & T. Co.*, 6 Cal. 590; *Benson v. City of New York*, 10 Barb. 223.)

*Charles Lindley*, for Respondents.

I. The law (Wood's Dig. 459) does not confer the power



on the Board of Supervisors to grant an exclusive right, but expressly authorizes them to multiply bridges as the public convenience may require.

II. Whoever takes a license for a bridge receives it subject to the exercise of this reserved right of sovereignty, and in this case the plaintiffs received their license subject to the rights of the defendants. The law under which the defendants construct their bridge was passed anterior to the issuance of the plaintiff's license in October, 1860.

III. The Legislature is the primary power to determine the question of public convenience, and it can delegate it to the Board of Supervisors and modify and revoke it at pleasure. In its discretion it determined that the public convenience required the construction of the defendants' bridge, and passed the special act in 1859 to authorize the same.

IV. The Legislature has no power to grant to the plaintiffs, through the Board of Supervisors or by itself, an exclusive right for one year either with or without perpetual right of renewal from \*year to year. (*Charles River Bridge Company v. Warren Bridge Co.*, 11 Pet. 548; *Hartford v. East Hartford*, Id. 534; *Ohio Life Ins. Co. v. De Bolt*, 16 How. 431; *State Bank of Ohio v. Knapp*, Id. 369; *Indian Cañon Road Co. v. Robinson*, 13 Cal. 519; *Bush v. Peru Bridge Co.*, 3 Ind. 21; 18 Conn. 451.)

I state as a legal principle that the Legislature has not power under the Constitution to vest, or cause to be vested, in an individual the exclusive right to control, provide for, and tax the public travel. The establishment and perpetual supervision of public highways, ferries, and bridges, to accommodate and facilitate the public travel, are matters of great political or public concern, and are rights and duties incident to sovereignty. This sovereign power, so indispensable to the Government, has been delegated to the Legislature by general warrant, and like all other delegated powers is a trust which the trustee can neither sell, diminish, or abandon.

The *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, was a cause growing out of a bridge charter claimed to be exclusive for seventy years. It involved vast rights to toll and travel, which had mostly grown up in the development of the country

after the passage of the charter. Upon this branch of legislative power, Justice Taney, delivering the opinion of the Court, held as follows:

“It may perhaps be said that in the case of the Providence Bank, the Court were speaking of the taxing power, which is of vital importance to the existence of every Government; but the object and end of all government is to promote the happiness and prosperity of the community by which it is established, and it can never be assumed that the Government intended to diminish its power of accomplishing the end for which it was created. *And in a country like ours—free, active, and enterprising—continually advancing in numbers and wealth, new channels of communication are daily found necessary both for travel and trade, and are essential to the comfort, convenience, and prosperity of the people.* A State ought never to be presumed

to surrender *this power*, because, like the *taxing power*, the whole community have an interest in preserving it undiminished; and when a corporation alleges that a State has surrendered for seventy years its power of improvement

[242] \*and public accommodation, in a great and important line of travel along which a vast number of its citizens must daily pass, the community have a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon does not appear. The continued existence of a Government would be of no great value if by implications and presumptions it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform transferred to the hands of privileged corporations.” The rule of construction announced by the Court was not confined to the *taxing power*, nor is it so limited in the opinion delivered; on the contrary, it was distinctly on the ground that the interests of the community were concerned in preserving, undiminished, the power then in question; and whenever any power of the State is said to be surrendered or diminished, whether it be the *taxing power* or any *other* affecting the public interest, the same principle applies and the rule of construction must be the same.

A series of cases arose under a general Banking Law of the State of Ohio, wherein it was claimed that the Legislature had

authority to surrender by contract the taxing power on bank capital; and having the power, had so exercised it. The first is the case of the *Ohio Life Ins. and Trust Co. v. De Bolt*, 16 How. In this case Chief Justice Taney, in delivering the opinion of the Court, held as follows:

"The powers of sovereignty confided to a legislative body are undoubtedly a *trust* committed to them, to be executed to the best of their judgment for the public good, and no one Legislature can by its own act disarm their successors of any of the powers or rights of sovereignty confided to the legislative body, *unless they are authorized to do so by the Constitution under which they are elected*. They cannot, therefore, by contract deprive a future Legislature of the power of imposing any tax they may deem necessary for the public service, or of exercising any other act of sovereignty confided to the legislative body, *unless the power to make such contract is conferred upon them by the Constitution of the State*; and in every controversy on this subject the question must depend upon the Constitution of the State, and the extent of the power thereby conferred on the legislative body."

\*Four of the Judges, to wit: Justices McLean, [243] Curtiss, Nelson, and Wayne, hold that the Legislature, under a general power of legislation, can transfer to an individual a part of that power. Justices Taney and Grier hold that the Legislature cannot transfer any part of such power unless authorized so to do by the Constitution, and that this authority must be expressed or implied from circumstances of great force, as fifty years acquiescence on the part of the executive, legislative, and judicial departments of a State Government; while Justices Catron, Campbell, and Daniel, hold that the power to surrender or transfer the trust cannot be implied, that it must be expressed, or it cannot exist. Thus it is seen that five of the Judges (a majority) concur in the principle which must govern this case, and four dissent.

The opinion of Justices Taney and Grier, proceeded upon the ground that fifty years of continued and uninterrupted acquiescence on the part of all the departments of the State Government, was sufficient to imply it; but here no such practice can be pleaded. It has been the other way; ferries

and bridges are granted upon the condition that other grants may be made, provided the public convenience requires it.

There is no precedent upon this point in the judicial department of our Government, but the legislative department, in the general ferry and bridge laws, has kept an eye single to the preservation of this control over the public travel, and provided that in all cases when the public convenience demands it, additional facilities may be furnished. Section six of the general law is as follows: No ferry, or toll-bridge, shall be established within one mile above or below a regularly established ferry, or toll-bridge, unless it be required by the public convenience, or where the situations of a town or village, or the intervention of some creek, or the crossing of a public highway, shall render it necessary. (Stat. 1855, 184.)

Our Constitution nowhere expressly vests the legislative department with power to transfer by compact the trust delegated, or any part thereof, or to bind any subsequent Legislature upon matters of purely public or political concern. After the special inhibitions, (sec. 21, art. 1,) it provides that

“this enumeration of rights shall not be construed to  
[244] impair or deny others retained by the people.” \*The right to have the trust executed, and not sold or abandoned, must be included in this general reservation.

In *Hartford v. East Hartford*, 10 How. 534—ferry case—in speaking of legislative duties, the Court say: “It can neither devolve these permanently upon other public bodies, nor permanently suspend or abandon them itself, without being usually regarded as unfaithful and indeed attempting what is *wholly beyond its constitutional competency*.”

“From the standing and relation of these parties, and from the subject matter of their action, we think that the doings of the Legislature as to this ferry must be considered rather as *public laws* than as contracts. They relate to public interest. They changed as those interests demanded.”

The case of *Norris v. Farmers' and Teamsters' Co.*, 6 Cal. 594, neither directly nor by implication denies the power to pass the act under which defendants construct their bridge. That case simply holds that a company of private citizens could not, without legislative authority, establish a free ferry so as to interfere with a ferry established by and under such

authority. The Court says: "The public grant of franchise of this kind should be protected by being held to be exclusive in the grantee, unless legally and duly ordered otherwise by the public authorities." Again: "the law will not sanction the establishment, without authority, of a ferry so contiguous to the plaintiff's bridge as to destroy the profits." The Court is especially urged to examine the case of *Bush v. Peru Bridge Co.*, 3 Ind. 21.

*Heydenfeldt*, in reply.

I. The leading question is, whether the franchise of the plaintiffs is an exclusive right. And here I beg to observe, that the authorities cited by the respondents have no analogy whatsoever to the case at bar. The facts are entirely and gravely different, and it is hoped that it will not be considered importunate to ask of the Court to apply that just degree of discrimination which is necessarily demanded by the different language used in the terms of the grant or right between this case and those which have been cited.

In the *Charles River Bridge case*, 11 Pet., there is not a \*single word from which can be derived an ex- [245] pression of exclusiveness in the grant, and in the elaborate dissenting opinion of Judge Story he does not pretend that his doctrine of exclusive right is drawn from any expression in the grant, but only implies it from the nature of the grant and the peculiar character of its subject matter.

In the case of *Bush v. Peru Br. Co.*, 3 Ind. 21, the discretion of determining the question of public convenience is expressly vested in the County Board, so that whoever takes, does so with explicit knowledge that he takes subject to be rivaled by the exercise of this irrevocable discretion. The language of the Indiana statute is thus: "*provided*, that no ferry shall be established within one mile immediately below or above a regularly established ferry, unless they (the Board) shall deem it important for the public convenience," etc.

The language of the California statute is as follows: "SEC. 6. No ferry or toll-bridge shall be established within one mile above or below a regularly established ferry or toll-bridge, unless it be required by the public convenience."

It will thus be seen in the first place, that our case differs

from the Charles River Bridge case, in that we have the express grant of exclusive right within a mile above or below, so that the reasoning in that case has no application or relationship whatever to this.

II. Having thus established the exclusive right, subject only to be defeated by the public convenience, the remaining inquiry is, how is this requisition to be determined? Is it a condition which rests upon facts, and to be established like any other fact? Or is it dependent upon the mere opinion of the granting power? In determining this question it is first insisted that the rule of construction must be the same as it is in a contract between private individuals. In the case of *Hyman v. Read*, 13 Cal. 444, this Court held, that "legislative grants are to be construed liberally in favor of the grantee;" and the following is some of the language used in the opinion: "What reason is there that our legislative acts should not receive a similar interpretation? Is it not at least as important in our free Government that a citizen should have as much security for his rights and estate [246] derived from the grants of \*the Legislature as he would have in England? What solid ground is there to say that the words of a grant in the mouth of a citizen shall mean one thing and in the mouth of the Legislature shall mean another thing?" "The words are the words of the Legislature upon solemn deliberation and examination, and debate. Their purport is presumed to be known, and the public interests are watched and guarded by all the varieties of local, personal, and professional jealousy."

Smith says: "A contract entered into between a State and an individual, or between a State and a corporation, is as fully protected as a contract between two individuals." (Smith's Comm. 385, sec. 253.) Again: "A constitutional act of legislation which is equivalent to a contract, and is perfected, requiring nothing further to be done, is a contract executed, and whatever rights are thereby created a subsequent Legislature cannot impair." (Id. 385, sec. 252.)

We stand, then, before the Court with an executed contract, for which we have paid a valuable consideration, and, therefore, insist that the conditions which are to defeat us must be explicitly found as matter of fact, and that it is

contrary to the nature of a contract that its dissolution or destruction should rest within the mere opinion or discretion of one of the contracting parties; that this cannot be so, in the nature of things, unless the language is so explicit as to admit of no other interpretation; that the language in this case not only admits of a different interpretation, but its plainest and simplest import points to the interpretation which we urge.

In adopting the Act of 1855 there must have been considerations of policy which governed the Legislature. Ours was a new, extensive, and undeveloped country, growing rapidly, and with limited conveniences; money was scarce and dear, and it required strong and sufficient inducement to engage our citizens in enterprises which were precarious and doubtful. It was only when the certainty of protection and the hope of large profits beguiled them away from the ordinary paths of commercial pursuits that they were found speculative enough to undertake works by which, if they derived large benefits, they conferred still larger benefits upon the country. It was this last consideration that operated upon the Legislature to grant the desired protection [247] to the parties who would undertake these risks.

Without protection, especially from disastrous and unhealthy competition, they would not have moved a hand. They were then told that their rights should be exclusive, and that no one should compete with them, "unless it be required by the public convenience." They received these words according to the ordinary acceptation of men—it was a condition they might accept or refuse; they looked at the work and its cost; they investigated the locality; they cast the horoscope of probabilities as to condition; and, indeed, if the public convenience demanded another bridge, it was a corollary that theirs would not be the less profitable—for that would imply such a growth of population, trade, and travel as would make their share of it fully equivalent to what they anticipated in the present. But the great point was, that the public convenience was a fact, and a fact to be ascertained like any other fact. Upon this they rested, and surely this was the intention of the Legislature—if it was not, then it was language calculated to beguile and delude; and if it was to be

left to the mere will of one of the contracting parties to decide this condition, no one would have been foolish enough to have invested a dollar in such an undertaking. But this Court ought to decide that the intention of the Legislature is as we construe it, because:

1. The policy of inducing these works would have suggested that much protection as a dictation of wisdom and prudence.

2. The language is clearly susceptible of that construction.

3. That would be the received construction according to the ordinary acceptance and understanding of mankind.

4. The construction is the only one which can do effective justice, which can exhibit a proper regard for the rights of property, and prevent a vandal spoilation.

5. If one of the parties to a contract use language which has the effect of misleading or deceiving the other, he should be held to a construction which would prevent his taking advantage of his own wrong.

The authorities all go to show that these conditions are facts, judicial facts, which must be determined by evidence, and I have not been able to find a single decision to [248] the contrary upon a statute similar to ours. (*Givens v. Pollard*, 3 A. K. Marshall, 320; *Casey & Finney v. Jones*, 2 Littell, 301; *Cotton v. Houston*, 4 Mowr. 288; see *Carter & Arnold v. Rufus & Notts*, 6 Dana, 46.)

It may be said that in the foregoing cases the condition which would go to defeat the exclusive right depended upon facts which could be ascertained, and, therefore, differs from the condition of "the public convenience."

To this there are several replies: 1st. These facts must not only exist, but must be cogent enough to render a ferry necessary, so that it comes at last to the same status as "the public convenience." 2d. It is certainly competent for the Legislature to make the condition of "the public convenience" a fact to be judicially ascertained; and they have done so by classing it with the other conditions which are: "the situation of a town or village," the crossing of a public highway, and the intervention of some creek or ravine.

But in Massachusetts the very question has been repeatedly decided, and the Court of Sessions there, before establishing a road, are obliged to adjudicate that it is "of common con-



venience and necessity." In *Comm. v. Egremont*, 6 Mass. 491, the Court say: "Before the appointment of a locating committee, an adjudication ought to have been made, that the way prayed for was of common convenience or necessity." (See also *Comm. v. Cumings*, 2 Mass. 170; *Comm. v. Sawin*, 2 Pick. 547.)

These decisions establish beyond a doubt: 1st. That the condition of the public convenience enters into the right. 2d. That it is a fact. 3d. That it is a fact to be judicially ascertained. 4th. That unless it is judicially ascertained, the rights of a party claiming against it are preserved.

This would seem to solve the whole question. For if the Legislature makes the State a party to a contract by which it confers a right, which is executed and vested, and which can only be defeated by a contingency, it necessarily makes that contingency, whatever it is, subject to determination by judicial power, and yields up the privilege of determining for itself a right which is totally inconsistent with and repugnant to the position of a party to the contract. The cases show that there is no difficulty in having this \*question judicially determined, and the Courts are [249] required to adjudicate upon it. It seems it can be found and determined as a fact just as well as any of the other facts which are classed with it, as sufficient causes for defeating the same right. Suppose that the allegation of the defense was, that the new bridge was rendered necessary by "the intervention of some creek or ravine." Can it be said that the Legislature should have the power to determine this question. There may be in fact no creek or ravine whatever, could one be established *pro hac vice*, by the act of the Legislature? And would a party's vested estate be taken away by a mere constructive ravine? I apprehend the Court would say that the fact must exist, and if it does not, the proprietor would be protected. And yet this fact is only one of a class to which belongs the one we are considering, to wit: "the public convenience." Then if they are classified together, and if the one is susceptible of ascertainment, just as is the other, why make a distinction, and say that the Legislature shall have the power *ex parte* to determine the one, but no power to decide the other.

I have shown from the highest authorities that the contract is to be construed in the same manner, and by the same rules, as if it were between two individuals. For when the State does business with a citizen, she does not for the purposes of any advantage take into the negotiation her mantle of sovereignty. She reduces herself to the citizen's garb, uses the citizen's language, and deals with him as an equal. Can it, then, be said, when her contract is to be construed, that she claims rightly that her sovereign position is to be considered as an element entering into the construction? And yet this is what the respondent assumes for her in this case. In answer to the question, who is to determine the public convenience? it is said to be that body to whom the public welfare is committed, to wit, the Legislature. Such a doctrine would be totally destructive of every vested right obtained by legislative grant. If the State can avoid the consequences of her contracts by setting up her sovereign power over the public weal, her very right arm of power to promote the public good is gone forever. It is only by an adherence to the "*uberrima fides*" that she can win the confidence of her citizens [250] to engage in enterprises necessary to the public well-being, and if in doing so, she temporarily surrenders a portion of her local control, she has obtained full value for it in the advancement of the public interests, and has only done what all States and nations have done before her, and are doing every year.

Although the Legislature (which is not the State, but only one of her departments of government) is charged with the general power of promoting the public convenience, yet it has given up the right of doing so in this case, by stipulating it as a condition of the contract, by classing it with other conditions, which are undoubtedly facts to be judicially determined, and by entering into a contract which requires in case of dispute a common Judge between the parties, and repels the idea that a party can be a Judge in his own case.

In conclusion, public policy, justice, and integrity, private interests, the wants of an advanced civilization, and judicial authority, all concur in demanding the construction which is here sought.

BALDWIN, J. delivered the opinion of the Court—COPE, J. concurring.

This bill was filed to restrain the defendants from building and setting up a free bridge over the Feather River, at or near Marysville. The ground of complaint is, that the plaintiffs are the owners and possessors of a licensed toll-bridge near by. The plaintiffs aver that the franchise was acquired in 1852 by the plaintiff Hanson; that since the acquiring of the franchise the holders thereof, assigns, etc., have done everything required of them by law; that all the franchises, property, etc., in connection with the bridge, have been held by the present plaintiffs since 1855; that in 1852 plaintiff Hanson and cocorporators, under the name of the Yuba City and Marysville Bridge Company, (having been previously organized as a corporation in this name,) made due application to the Court of Sessions of the county of Yuba for authority to construct their bridge, and duly observed and fulfilled all the terms and requirements of the law; and on the fifth of October, 1852, that Court, by order, granted to the corporation authority to construct and a license to keep the same and collect the tolls thereon \*for twenty years; [251] that the corporation did construct the bridge at great cost, and fulfilled the various provisions of law prescribing the duties of owners of bridges; that the corporation obtained renewals annually of the license from the Court of Sessions until this power was taken from that Court, and afterwards obtained such renewal from the Board of Supervisors since the change of the law giving this power to such Boards—paying license fees, and conforming to the laws in this respect; that the last of these licenses was granted for one year from the sixth day of August, 1860, when the plaintiffs executed bonds, and did the other things required of them to perfect their right. The bill further avers, that the defendants are proceeding to destroy the rights of the plaintiffs by the erection of a bridge across the Feather River, and within six hundred feet of the toll-bridge, which will prove utterly destructive of the value of the franchise of the plaintiffs. This is done under the color of the Act of the Legislature, passed April 11th, 1859, which grants the right and

privilege to the County of Sutter of constructing and keeping across Feather River a bridge for public use, extending from Fifth Street of the city of Marysville, in the county of Yuba, to the opposite bank of the river, the cost of the bridge to be paid for partly by private subscription and donations, and partly by warrants to be drawn on the County Treasurer of Sutter County, and on a fund therein styled the Bridge Fund, and "when said warrants are paid by toll derived from said bridge, then said bridge shall be free for all crossings of persons or property." The bill goes on to aver, that the plaintiff's bridge is, in every respect, sufficient for the public wants and convenience, and that the new bridge is not needed for public or private accommodation.

The Judge of the County Court of Sutter having denied an injunction upon this bill, the plaintiffs below appeal from this order; and counsel, waiving technical objections, have desired that the case thus made be decided upon its legal merits.

We do not consider it necessary to criticise very closely the provisions of the Act of 1850 or 1855 in reference to bridges, ferries, etc., to determine whether the rights of the plaintiffs are governed by the first or last of these statutes, or both together; nor is it necessary to decide the question of [252] the power of the Legislature to \*divest itself, by way of grant, of the right to make any further or other grant of a ferry or bridge franchise, so as to interfere with the business or profits of the one first granted. For it is not pretended that any express grant was made to the plaintiffs here to this effect. The Acts of 1850 and 1855, while they empower the Court of Sessions in the one case, and the Board of Supervisors in the other, to grant this franchise, do not purport to make the grant in exclusion of the right of the State, or the Board, or the Court, to grant to any one else a franchise for a bridge or ferry in the same neighborhood, or so situated as to interfere with the first. These franchises, being sovereign prerogatives, belong to the political power of the State, and are primarily represented and granted by the Legislature as the head of the political power; and the subordinate bodies or tribunals making the grants are only agents of the Legislature in this respect. But the dele-

gation of these powers to these subordinates in no way impairs the power of the Legislature to make the grant. The effect of the grant is unquestionably to give a right of property to the grantee or licensee; and it would not be in the power of the Legislature to divest this property or transfer it to another person, so long as the owner held in obedience to the law. No attempt is made to divest *this property*, or to destroy or impair *this franchise*. What the appellants contend for is, that not only have they this property and this franchise, but they have also the right to insist that no other franchise of like kind shall be granted, the effect of which would be to *impair the value and take away the profits* of their own; in other words, that their grant is of the exclusive right to the profits of the travel in the neighborhood—at least within the distance of this bridge to their own. We think the rule is settled to the contrary at this day. Ever since the great case of the *Charles River Bridge Company v. Warren Bridge Company*, 11 Pet. 548, these grants have been held not exclusive—as granting a right, but not as estopping the granting power from making other grants, though the effect of the last be to destroy the profits of the first. (See, also, *Hartford v. East Hartford*, 11 Pet. 534; *Bank of Ohio v. Knapp*, 16 How. 369; *Bush v. Peru Bridge Co.*, 3 Ind. 21; *Indian Cañon Road v. Robinson*, 13 Cal. 519.)

\*The question is very fully considered in the cases [253] of the Supreme Court of the United States and in the case of 3 Indiana. The reasoning upon which the conclusion negating the claim of the grantee goes is, that the grant is not *in terms* a grant of an exclusive right; and that the Government holding this power, to be exercised for the public interest and convenience, is not to be presumed to part with it; but the intent to do so must affirmatively appear, and be plain and manifest, and that this intent is not shown from a mere grant of the franchise and privilege, this grant being effectual to show that the Legislature had given the particular right to one grantee, but not proving that the Legislature had divested itself of all power to grant in the same vicinity to any other.

It is not necessary to criticise the particular language of the Act of 1850; for supposing that the limitations and pro-

visions applicable to the Court of Sessions apply to or control the Legislature, and supposing further, that the rights of the appellants rest under and are protected by that act—suppositions which we make only for the argument—still, by the Act of 1850, there is no grant of an exclusive right. It is true, the Court of Sessions could by that act only grant another bridge or ferry franchise—after the first had been granted—in certain contingencies, the public convenience being one; but the question is, who is to judge of the public convenience, or whether a given thing is for that convenience. The answer is, that body or power to whom the public welfare is committed with the general power to provide for and promote it. Public convenience, in this sense, is not a fact so much as it is a conclusion, or matter of judgment, or of expediency, and it is the same thing as if the word interest or policy were used, the effect of which would be to make the action of the granting power to depend upon its discretion, which probably could not be reviewed in a Court of Justice. It would be peculiarly a matter of political regulation, not a fact for legal ascertainment.

While it may shock our notions of a true conservatism that the Legislature should, as the facts represent them to have done here, be allowed to deal harshly with individual rights, after having authorized and encouraged an enterprise, leading necessarily to the expenditure of a large sum of [254] money upon the faith that the profits \*should be suffered to be enjoyed without legislative interruption; still this seems, under the law, as it is written, to be one of those evils—if it be one—for which the Courts can furnish no corrective.

Judgment affirmed.

## CALIFORNIA NORTHERN RAILROAD CO. v. GOULD.

- <sup>1</sup> **RIGHT OF WAY TO RAILROADS.**—The Act of Congress of August, 1852, which gives to railroad and other companies, on complying with certain conditions, a right of way over the public lands, does not confer upon the companies availing themselves of its provisions the right to enter upon premises in the actual occupancy of a settler without compensating him for the damage done to his possession.
- <sup>2</sup> **IDEM—PURPOSE OF ACT.**—The purpose of the Act of Congress was merely to give a right to enter upon the public lands, assuming them to be vacant, and its effect is to relinquish to the companies complying with its requirements any claim for compensation that might belong to the United States, as proprietor, under any proceeding, by virtue of a State law, to appropriate the land for public use.
- <sup>3</sup> **SETTLER ON PUBLIC LANDS.**—A settler upon the public lands in this State, having no other title than that of occupancy, cannot, consistently with the policy of the General Government and of the State in reference to such lands, be treated by the Courts as a naked wrong-doer. As against persons claiming a simple privilege like that conferred upon railroad companies by the Act of Congress of August, 1852, he has an equitable right to his possession and improvements which the Courts will protect.

## APPEAL from the Fifteenth Judicial District.

The facts are stated in the opinion of the Court. Defendant had judgment in the Court below, and plaintiff appeals.

*W. W. Stow*, for Appellant.

I. Plaintiff is entitled to the equitable relief prayed for, and the remedy chosen is the proper one. The Act of Congress under which plaintiff claims the right does not give to railroad companies the fee of the land or any estate therein, except a "right of way," an "easement," *i. e.*, a possessory right for the purposes of the railway—the fee and estate remaining in the United States or its grantees. The parties, then, occupy this attitude: A right of way is vested in plaintiff. Defendant disputes that right, and is in possession. Plaintiff asks for a judgment that the right [255] be adjudged to it, and it be allowed to exercise it. If plaintiff had brought ejectment, it would have only determined the right of possession at the date of the ouster alleged in the complaint. The writ might issue; plaintiff under it obtain possession, and lay down its railway; but the moment its employes left, defendant could reënter, remove the

<sup>1</sup> Commented on and case distinguished in *Doran v. U. P. R. R. Co.*, 24 Cal. 258; affirmed in *O. N. R. R. Co. v. Southworth*, Oct. T. 1862 (not reported.)

track, etc., and thus a perpetual squabble would be kept up, unless a Court of Equity can interfere and determine the right, and also adjudge that defendant be perpetually restrained from interfering with the right as long as it continues.

Story (2 Story's Eq. Jurisp. 189, sec. 852) likens "bills of peace" to bills "*quin timet*," and concedes they may be brought before an action at law to determine the right. (Sec. 853.) By a bill of peace we are to understand a bill brought by a person to establish and perpetuate a right, etc.

Again: "The obvious ground of the jurisdiction of Courts of Equity in cases of this sort is to suppress useless litigation, and to prevent multiplicity of suits." Under the power of the Court to grant injunctions, plaintiff (the right of way being conceded) has a right to the relief sought in this action. (*Croton Turnpike Co. v. Rider*, 1 Johns. 615; *Ogden v. Gibbons*, 4 Id. 150.)

II. The defendant is not entitled to compensation. He is a mere trespasser on the land. He concedes the land to belong to the United States. Our right of way was granted to us in 1852. No Preëmption Law, or law authorizing defendant to take possession of the public lands of the United States, was passed until 1853. (*Lester's Land Laws*, 205, 208.)

At that time, all United States land was subject to the right of way plaintiff claims. No right could be acquired under the United States as long as the title remained in the Government except subject to the right of way. If defendant is to be paid, the grant to plaintiff is nugatory, is without value, is a mockery; it is defeated by a naked trespasser without any right.

It may be said that the United States Government has acquiesced in defendant's possession; that the legislation of this State protects settlers upon the public lands in their possession, and these give defendant a right to compensation.

[256] \*We answer: 1st. Our grant by Act of Congress is superior and paramount to any assumed right of defendant based upon the silence of the Government. 2d. No legislation of this State can divest the title of the United



States in the public lands. (See the Act admitting this State into the Union.) Nor can it divest a right granted to us by Congress. Then it cannot do indirectly what it cannot do directly by compelling us to pay for that which is ours by giving defendant a compensation for being, as against us and our grantor, a trespasser.

If the position is sound that compensation must be made by us, then the Act of Congress avails nothing. We might proceed under the statute of this State to obtain the right of way and make compensation to defendant. But surely that was not the design of the Act of Congress. The inquiry what defendant is to receive compensation for, it seems to us will answer the question.

It is not for the land, or injury to the freehold. That is granted to us by Congress. Defendant does not own it, and as against us and our grantors has no right to the possession of it. Nor can it be for injury to the buildings, fences, orchards, etc. We do not interfere with them, besides, he erected them without right or color of right, and in subordination to the grant to us. Nor for disturbing defendant's possession. His possession is wrongful; it gave him no right against our positive grant. What, then, is defendant to be compensated for? We are at a loss to see how any right of his known to the law is impaired, invaded, or injured, and the only pretext for compensation is, that he stands in the way of a public improvement.

This question is important for our young State. Congress has granted the same rights to the railway across the continent, and if upon all the unsold and unsurveyed public lands along the route, individuals can take possession and demand compensation in spite of the grant, then a law of Congress is a nullity. A grant by the legally recognized owner confers no right. Instead of the Government owning the land, possession is the highest and only evidence of title, and railroad corporations, instead of building roads upon the estimate of engineers, must provide a large fund to compensate trespassers for a supposed right which is unsupported by law and can only be maintained by force.

*\*H. O. & W. H. Beatty, for Respondent.*

[257]

I. As to the form of the remedy. That form which plaintiff has sought to avail himself of is clearly a bill in equity. When one seeks only to be put into possession of real estate, certainly a Court of Law is the proper tribunal. Here, there is no reason shown why the remedy at law would not be as quick and as efficacious as the equitable relief sought. The suggestion of counsel that if they recovered in ejectment, other trespasses might be committed, appears to us utterly puerile. The sections cited by appellant's counsel from Story's Equity Jurisprudence, 852, 853, simply show that bills of peace may be resorted to "by a person to establish and perpetuate a right which he claims, and which, from its nature, may be controverted by different persons at different times and by different actions." Their object is to prevent fruitless litigation and multiplicity of suits. In this case it cannot be claimed that there would be any danger of multiplicity of suits if plaintiff had resorted to the action of ejectment.

II. The next question is, is the defendant entitled to any compensation. Appellant attempts to show that he is not, by assuming two propositions: 1st. That the respondent is a mere trespasser. 2d. That the rights of the railroad became vested by the passage of the law of Congress in 1852.

We will first notice the latter proposition, because the former is deduced as a sort of corollary therefrom. How a corporation that had no existence until 1860 could have acquired vested rights in 1852 is to us a mystery. The reasoning of counsel seems to be, that although respondent entered innocently into the possession of these lands, which he has occupied for seven or eight years past, the moment this corporation was formed its vested rights related back to the time of the passage of the Railroad Law, and the respondent, who for years had been the innocent and meritorious possessor of the land in dispute, by some new-fangled doctrine of relation became all at once a trespasser *ab initio* against a body politic which was not in existence to be trespassed against. It is folly to suppose that Congress by the passage of the Railroad Law intended to prevent all persons from settling on  
[258] the public lands, lest, perchance, \*they might interfere with the running of some future railroad. The

utmost extent to which that law could be stretched, as a limitation on the right of settlement on the public domain, is this: It was a grant of the right of way, so far as the Government was concerned, to all future railroads to pass through the public lands. Every railroad corporation might, under the provisions of the State or local laws, have a right of way over the Government property. So far as the value of the mere naked land is concerned, we doubt not that the plaintiff is entitled to it under the Act of Congress. But in order to get at this land, to take it into possession, it has to destroy the possession, or rather, to open the inclosure around other land to which it has no claim. This is a damage done to the occupiers of the land, for which it is just and equitable that it should pay.

The railroad derives all its authority, powers, and privileges under the State law. That law provides that, under certain circumstances, commissioners shall be appointed to assess damages to the persons interested in the lands through which the road is to pass, "either as owner, claimant," etc. Compensation is to be awarded to the "owners and persons interested for the taking or injuriously affecting such lands," etc. (See sec. 28, Railroad Act, Wood's Dig. 600.) Congress authorizes the railroad, acting in subordination to the State law, to appropriate the right of way. The State law, under which the incorporation derives all its rights, only permits it to interfere with the claims or possessions of private individuals upon paying for the injury done them.

Can the appellant, which only enjoys its existence and the power to build any road or enter upon any land under the provisions of our State law, disregard that law in one particular, while it acts under it in others?

The answer to this on the part of the appellant is, that the defendant is a trespasser, and, therefore, not under the protection of the law. We have, we think, sufficiently shown that if he was not otherwise a trespasser, the Railroad Law did not make him so.

Then, leaving that law out of the question, we hardly think this Court will say that one who enters into vacant public lands in this State, and occupies and improves them, is a mere naked trespasser. \*The rights of such [259]

persons, acquired under our State laws, have been maintained in this State in some hundreds of cases, many of which have been before this Court, and we never heard them spoken of before as mere trespassers. The Government has at least indirectly encouraged the settlement and working of its mineral and other public lands, and it is not permissible, under such circumstances, to call all miners and others on such lands, although having no title, naked trespassers.

NORTON, J. delivered the opinion of the Court—FIELD, C. J. and COPE, J. concurring.

The complaint in this action sets forth that the plaintiff has taken the requisite steps to acquire the right of way for its road over certain premises therein described under the Act of Congress of August, 1852, which gives such right over the public lands; that the premises are public lands, unsurveyed and not held for public use by erections or improvements thereon, and that by virtue of said Act of Congress the United States have granted to the plaintiff the use of said premises for the track of its railroad; that the defendant is in the actual possession of the premises, and refuses to permit the plaintiff to construct its road over said premises, and insists that the plaintiff has no right so to do. The complaint, therefore, asks for a judgment that the plaintiff is entitled to such right of way, and that the defendant has no right, interest, or estate in the premises, and that he be enjoined from preventing or interfering with the construction of the plaintiff's road.

The answer of the defendant denies that the premises are public lands of the United States, and claims title to them derived from the United States. It also sets forth that the plaintiff had heretofore instituted proceedings under the Railroad Act of this State against the defendant to acquire title to the same premises for the use of its road, and that the sum of \$1,086 74 had been awarded to him as compensation, which the plaintiff refused to pay.

The replication denies the title claimed by the defendant.

The Court below, without finding directly whether the premises were public or private lands, decided that the defendant could not be deprived of his right of property, re-

sulting from his possession, \*without compensation, [260] to be ascertained as provided by the Railroad Act of this State. It also held, that the plaintiff was estopped by its former proceedings from resorting to this action.

Assuming that the allegations of the complaint are true, and this appears to be the basis upon which the conclusions of the Court below are placed, the proceedings taken by the plaintiff under the Act of Congress had the effect to invest it with the right to enter upon the public lands of the United States, certainly so far as to relive it from the character of intruder or trespasser, and to shield it from any claim for damages on the part of the United States, and to protect it in the enjoyment of the use of the premises and any improvements it might place thereon, against any person thereafter claiming under the United States. But the Act of Congress does not, in terms, grant any other estate or right which pertains to the United States as proprietor of the public lands. It was, doubtless, the purpose of the act merely to give a right to enter upon the public lands, assuming them to be vacant, and its effect is to relinquish to the plaintiff any claim for compensation that might belong to the United States as proprietor under any proceeding under the State law to appropriate the land for public use. But does this confer upon the plaintiff the right to enter upon premises in the actual occupancy of a settler without compensating him for the damage done to his possession? The United States, upon ejecting such an occupant, might not be under any obligation to pay for his improvements, but they may give to him a preëmption privilege, and this is in consonance with the policy heretofore pursued by the General Government toward settlers upon the public lands. There is scarce a doubt but this defendant will ultimately become the owner of an hundred and sixty acres of the land he occupies, with all the improvements, upon paying the Government price of the unimproved land. Our own State laws protect settlers upon the public lands under certain conditions, although the State has no power to give a right of occupancy in the character of proprietor. In view of this policy of the United States and of our own State in regard to the public lands, such settlers cannot consistently be treated by our Courts as naked

wrong-doers, having no equitable rights in their improvements as \*against persons claiming a simple privilege, like that conferred upon the plaintiff by the Act of Congress. In the case of *Robbins v. The Milwaukee & Horican Railroad Co.*, 6 Wisconsin, 636, where lands were taken apparently under a Railroad Act similar to that of this State, the plaintiff was allowed to recover for damage done to his rights as a mere occupant, although expressly refused compensation for the land, because he had shown no other title or right than that of bare occupancy. We think the plaintiff cannot ask the aid of the equitable powers of the Court to enable him to acquire the defendant's actual possession, under these circumstances, without compensating him for the damages which he will sustain.

The judgment is therefore affirmed.

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## PEOPLE v. GRAHAM.

**CHANGE OF PLACE OF TRIAL—POPULAR PREJUDICE.**—The affidavit of the accused, that he cannot have an impartial trial in the county where he is indicted, is not alone sufficient to authorize a change of the place of trial.

**IDEM—INSUFFICIENCY OF CAUSE.**—Nor does the fact that thirty or forty persons in the community, upon being solicited, have contributed small sums to defray the cost of employing a lawyer to assist the District Attorney in the prosecution of a criminal action, show such a general prejudice in the citizens of the county as to require the granting of a change of venue. *People v. Lee*, 5 Cal. 353, commented upon, and its doctrine as to change of venue questioned.

**HEARSAY EVIDENCE INCOMPETENT.**—On the trial, under an indictment charging an assault upon a young child, after the child had been examined as a witness by the prosecution, and had not been able, from her tender age, to state any material fact, it was proposed to ask another witness this question: "Did the child tell you how this occurred at the time?" and under the objection of defendant the Court permitted the question: *Held*, that this was error, and that if the witness answered the question affirmatively, it was material error for which a new trial should be granted.

**CHILDREN AS WITNESSES.**—That a child, for an assault upon whom defendant is being tried, not having sufficient capacity to be a witness, was sworn and questioned but withdrawn before she had testified to any material fact, is no ground for granting a new trial. The suggestion that her appearance was calculated to excite the sympathy of the jury and influence their judgment, is not entitled to any consideration.

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<sup>1</sup> See *People v. Shuler*, 28 Cal. 490.

<sup>2</sup> Cited as authority in *People v. White*, 34 Cal. 138.

**QUESTION BASED ON SUPPOSITION.**—A question based upon the supposition of a state of facts not proved is improper.

**DECLARATIONS OF DEFENDANT.**—An instruction embracing the proposition that what was said in his own behalf by the defendant, in a conversation proved between him and a witness, must be taken as true if what he said against himself is taken as true, is erroneous.

**\*APPEAL from the Court of Sessions of Sonoma [262] County.**

The defendant was indicted in Sonoma County for an assault with intent to commit a rape upon a girl six years of age. After pleading not guilty, he applied for a change of venue, and in his own affidavit stated that he could not have a fair and impartial trial in Sonoma County on account of the bias and prejudices of the citizens against him; that within a short time before the time fixed for trial, some thirty or forty persons had subscribed each a small amount for procuring a lawyer to assist the District Attorney in the prosecution; that these persons were citizens of different parts of the county; that the subscription papers had been widely circulated, and that from the funds thus raised an attorney had been employed. The affidavits of two other persons were also presented corroborating that of defendant as to the circulation and signing of the subscription papers. The Court denied the application, and defendant excepted. On the first trial of the case the jury disagreed. On the second trial the child upon whom the assault was alleged to have been committed was called by the prosecution as a witness, and was objected to by defendant as not having sufficient capacity to testify, upon which she was questioned at considerable length by the Court with a view of ascertaining her competency, and her answers showed very little intelligence and scarcely any appreciation of the obligations of a witness. The objection to her competency was overruled and defendant excepted. In answer to questions by the prosecution, she then said that she knew defendant; had seen him at her house, and recollected the last time she saw him there, and knew what he did. She was then asked what he did do there that day, but without answering this question she burst into a paroxysm of crying and was withdrawn.

The mother of the child was also called as a witness for

the prosecution, and having stated that she had been absent from her house a short time on the morning of the alleged assault, and that on returning she had found the girl crying, and had examined her clothes and person, the appearance of which she described, and saying, in substance, that the appearances were such as showed that the defendant had [263] committed the offense charged, was asked \*by the District Attorney this question: "Did the child tell you how this occurred at the time?" To this question defendant objected on the ground that it was hearsay, and also that the answer would, even if given by a simple affirmative response, necessarily indicate the *nature* of the declarations of the child. The Court overruled the objection, and defendant excepted. The original record as it stood at the time the first opinion was rendered by the Court, did not show that any answer was made to this question, but after the rendition of that opinion an amended transcript was filed, showing that the witness did answer to the question "Yes, sir," after which a rehearing was granted, and the second opinion delivered reversing the judgment. The other facts necessary to explain the points decided are sufficiently indicated in the opinion of the Court. The jury found the defendant guilty, and a motion for new trial having been made and denied, he was sentenced to twelve years' imprisonment. From the order denying a new trial, and from the judgment, defendant appeals.

*L. D. Lattimer*, for Appellant.

I. The motion for a change of venue should have been granted. The case is precisely like that of *The People v. Lee*, 5 Cal. 353, except as to the number of citizens who united to employ counsel to prosecute the defendant. In this case the number shown is some thirty-five or forty; in the case of *Lee*, about one hundred.

II. The following question asked the witness Elizabeth Jane Hickie by the prosecution, to wit, "Did the child tell you how this occurred at the time?" was improper, and the defendant's objection to it should have been sustained.

1. The declarations of the injured party are never admissible as evidence, unless she has testified in the case.



(Wharton's Am. C. L. 3d ed. 306; 2 Russell on Crimes, 751; 1 Id. 6th Am. ed. 658; *People v. McGee*, 1 Denio, 21; *Johnson v. State*, 17 Ohio, 593; *Guttridge's case*, 9 C. & P. 471.)

2. Even had the injured party in this case been examined as a witness, still this question was inadmissible under the rule excluding the particulars of the complaint made, etc. The witness had just \*completed her narrative [264] of the condition she found the child in, the appearance of her clothes, the injuries, marks, etc., found upon her, and then comes the question, "Did the child tell you how this occurred?" How what occurred? Why, how everything occurred that she had just related in her testimony concerning the child.

III. The Court erred in admitting the child to be sworn as a witness in the case. The examination showed her wholly wanting in every requisite of competency. (1 Phillip's Ev. with Cowen & Hill and Edward's Notes, 11-14.)

It will not do to say that the defendant could not have been prejudiced by this error, because the witness was removed from the stand before she testified to the merits of the case. Anything or any proceeding which was calculated to operate upon the sensibilities and sympathies of the jury, and influence their minds against the defendant, was prejudicial to him; and that the placing of this child on the stand before them as a witness was calculated to produce that effect, is a fact that every person possessing the ordinary feelings of human nature must admit, and that this, together with the scene that followed, did produce that effect in an eminent degree, is a fact equally apparent; and it would seem from the record that this effect was the only object sought by bringing the child into Court on this second trial.

IV. The question put to the physician by the defendant was competent in any view of the then state of the case, and should have been allowed. The evidence already given showed a certain injury to the person of the child, and was intended and calculated to impress upon the jury that it had been made in a particular way, totally inconsistent with defendant's innocence. It was unjust not to allow him to show that the particular injury could not have been made in the way indicated, because if so, other injuries which did not in

fact exist would necessarily have been produced. Further, the objection of the prosecution was general—no point or cause of objection stated—and should therefore have been overruled. (*Kiler v. Kimball*, 10 Cal. 268; *Martin v. Travers*, 12 Id. 243; *Dunning v. Rankin*, 19 Id. 643.)

V. The instructions given by the Court were erroneous, and those asked by defendant were improperly refused.

[265] \* *Attorney-General*, for Respondent.

NORTON, J. delivered the opinion of the Court—FIELD, C. J. and COPE, J. concurring.

The affidavit of the accused, that he cannot have an impartial trial in the county where he is indicted, is not alone sufficient to authorize a change of the place of trial. The fact that thirty or forty persons, upon being solicited, have contributed small sums to defray the cost of employing a lawyer to assist the prosecuting attorney, does not show the existence of such an excitement or prejudice in the whole county upon the subject as would preclude the possibility or probability of procuring an impartial jury without difficulty, or would in any manner interfere with the impartial administration of the laws. From the condensed statement of the facts embraced in the opinion of the Court in the case of *The People v. Lee*, 5 Cal. 353, we cannot say how strong a case was presented, but it was certainly a stronger case than the present. It appears to have been decided without an examination of the law as it is now settled, and we should not be justified in applying it as authority in any case falling short of it in any degree. (*Bowman v. Ely*, 2 Wend. 250; *The People v. Wright*, 5 How. Pr. 23; *People v. Bodine*, 7 Hill, 181.)

The decision of the Court that the witness might testify to the statements made by the child as to the occurrences, and with regard to which the child had not testified, was erroneous. (2 Russell on Crimes, 6th Am. ed. 751; *People v. McGee*, 1 Denio, 21; *Johnson v. State*, 17 Ohio, 593.) But it does not appear from the statement what the witness testified. The question was: "Did the child tell you how this occurred at the time?" This was objected to. The statement then

says: "The Court overruled the objection and permitted the question to be asked and answered. To which ruling of the Court the defendant then and there excepted." This is all that appears. If the witness did answer and stated that the child did not tell her anything, no injury could have resulted to the defendant. In order to make the objection available, it should appear that some testimony was given—that is, some evidence was improperly admitted—from [266] which at least injury might by possibility have resulted.

Whether the child was of sufficient capacity to be sworn as a witness is also immaterial, because she was withdrawn from the stand before she had testified to any fact in the case. That her appearance on the stand was calculated to excite the sympathies of the jury cannot authorize the inference that the jury were thereby influenced to disregard their oaths, or were deprived of the free exercise of their judgments. Her presence in the court room would have a similar tendency, but unless we can trust to the intelligence and integrity of juries to withstand such influences, we must dispense with the use of juries as a part of the machinery for the administration of justice.

There was no error in ruling out the question put by the defendant to the physicians as to whether a certain injury could be produced in a particular way without producing certain other injuries. It is not clear that it was material. It was not necessary to the offense charged that such an injury should have been done in any way. It would have been pertinent on a charge of committing the crime itself, but not on a charge of an assault with an intent. Nor does it appear to be material to corroborate the statement of the defendant as to how that injury occurred, because his statement in that respect does not appear to have been questioned, and indeed is in consonance with the facts charged in the indictment, which, as we have said, are of the assault with intent, and not the fact of the crime intended. But the decisive objection to the question is, that it was based upon the supposition of a state of facts not proved. The inquiry was if this injury could have been effected in a particular way if a certain condition existed; but whether that condition existed in relation to this defendant was not proved, nor could it be assumed for

the purpose of making the desired proof. If the Court decides correctly in rejecting the testimony, it is not important whether the best objection was made, or whether any objection was made. If the Court decides erroneously, for some reason not brought to its attention, such error, as a general rule, will not cause a reversal.

None of the objections taken to the instructions [267] given by the \*Court to the jury are well founded. It would be an unprofitable labor to detail the reasons why these instructions were correct in each case. It is sufficient to say that they presented the law correctly. The obscurity in the language, which is objected to one or two of them, is not of a character that could have misled the jury, or left them in doubt as to the law which was intended to be laid down. The use of the word "intent" is of this character. By a rigidly grammatical construction, it might be applied to the offense charged, and thus be unmeaning; but used in reference to the peculiar offense charged in this case, the jury could not have reasonably understood it otherwise than as a charge that the intent must have existed to commit the offense, the intent to commit which was the essential ingredient of the crime charged, and not that there must have been an intent to have an intent. And so as to the charge in regard to a reasonable doubt. In using the expression that it is not a mere possible doubt, the obvious meaning is that the jury are not to require proof establishing a fact beyond the possibility of its being otherwise. Neither did the Court assume any fact in reference to opening the child's clothes. That fact was stated in the conversation of the defendant with one of the physicians. There was a difference in one word, but not changing the sense. It was not error to refuse to give the seventh instruction asked by the defendant. The rule had already been correctly given in the third instruction asked by the prosecution, and was given in the second instruction of the Court. If the seventh instruction asked by the defendant was identical in substance with the charge as twice given, no injury can have resulted from its not having been given a third time; but if it is supposed to embrace the proposition that what was said in his own behalf must be taken as true, if what he said against himself is taken as true,

and it is possible that the jury might have received this impression, then it would have been erroneous.

We think the judgment should be affirmed.

On rehearing, after the filing of the amended transcript as shown in the statement of the case, NORTON, J. delivered the following opinion—FIELD, C. J. and COPE, J. concurring.

\*In deciding this case, we stated that the ruling of [268] the Court below, allowing evidence to be given of the statements made by the child who had not testified, was erroneous, but that this error was not of a character to require a new trial, because it did not appear that the witness answered whether the child did or did not tell her anything. It appears now, by an amendment of the record, that the witness answered in substance that the child did tell her how the matters occurred which the witness had just testified about. It is impossible not to see that the effect of this answer, taken in connection with the immediately preceding testimony of the witness, was the same as if the witness had detailed what the child said. This not only may have had, but in all probability did have, an influence upon the jury injurious to the defendant. For this error the judgment must be reversed.

In our former decision we stated that it was not clear that a certain fact offered to be proved by the physicians was material. Considering the testimony which had been given on behalf of the prosecution we were not prepared to decide that this fact was immaterial if the proper preliminary facts were proved or admitted, and as this case is going back for a new trial we deem it proper to say that this remark should not be allowed by the Court below a bearing beyond its language. In criminal cases especially, care should be taken not to exclude testimony in behalf of the accused upon doubtful grounds.

Judgment reversed, and cause remanded for a new trial.

LEWIS v. RIGNEY *et al.*

**SETTING ASIDE JUDGMENT.**—In an action of ejectment against two defendants, one was served with summons and made default, and without any service being had upon the other, a judgment was entered against both for possession of the premises and costs. On application of the defendant not served, an order was made at a subsequent term of the Court, setting aside the entire judgment as to both defendants, with leave to the defendant not served to answer: *Held*, that this order was proper.

[269] **IDEM.**—\*The effect of such an order is not to set aside the default of the defendant who had been served, or to permit his co-defendant to defend for both. A new judgment may at once be entered by the plaintiff against the defaulting defendant.

<sup>1</sup> **IDEM.**—The sixty-eighth section of the Practice Act applies not only to cases where a judgment has been taken regularly without personal service, as upon publication of summons, but also to cases of judgments entered erroneously without any service of summons or appearance of defendant.

**DISCRETION OF COURT IN CORRECTING MISTAKE.**—Where, pending a motion by a defendant who had been served with process to set aside a judgment erroneously entered at a previous term against him and a co-defendant who had made default, the plaintiff applied to the Court to correct the judgment by striking out the name of the moving defendant, on the ground that it had been inserted by a mistake of the Clerk: *Held*, that, admitting the mistake, it was within the discretion of the Court to deny so tardy an application.

## APPEAL from the Sixth Judicial District.

This was an action of ejectment brought by O. C. Lewis against Peter Rigney and B. C. Quigley for a lot situated in Folsom, Sacramento County. The complaint was filed December 24th, 1860, and charges that both defendants are wrongfully in possession, and prays judgment against both for possession and costs. On the sixth day of May, 1861, the summons was personally served on defendant Quigley, in Sacramento County. No service of any character was had on Rigney, and on the twenty-fourth day of May, at the April Term of the Court, Quigley having made default, plaintiff moved for judgment, and a judgment was entered against both defendants for the possession of the premises and costs. On the third of June following, another term of the Court

<sup>1</sup> Cited as authority in *Casement v. Ringgold*, 28 Cal. 338, citing and commenting on numerous authorities; and see *Reese v. Mahoney*, post 805; *Hove v. Independence Co.*, 29 Cal. 72; *Bailey v. Tuaffe*, Id. 422; *Francis v. Coz*, 33 Cal. 325; *Parrott v. Den*, 34 Cal. 80; *Winter v. Fitzpatrick*, 35 Cal. 269; *Leet v. Grants*, 36 Cal. 288; *Coleman v. Rankin*, 37 Cal. 249; *Hancock v. Pico*, 40 Cal. 154; and *People v. Seale*, Oct. T. 1866 (not reported.)

having commenced, Rigney presented an affidavit, setting forth that he had not been served with process, that he was the real owner of the land, and had a good defense, and, on notice to plaintiff, moved thereon that the entire judgment rendered at the previous term be set aside, and that he be permitted to defend.

Pending this motion, plaintiff applied to the Court for a correction of the judgment by striking out the name of Rigney therein, alleging that his name had been inserted by mistake by the Clerk, and in support of this motion filed an affidavit of his attorney that he had only asked for a judgment against Quigley alone, and that the Clerk by mistake had entered a judgment against both defendants; that this error was pointed out by plaintiff's attorney to the [270] Clerk before the minutes were signed by the Judge, and the Clerk had promised to correct it—also the affidavit of a deputy of the Clerk that he had been requested by plaintiff's attorney to correct the judgment entry, and had before the minutes were signed called the Judge's attention to it, and was told by him that as an execution had issued, the correction must be made, if at all, by motion in open Court. An affidavit of defendant Quigley was also filed, stating that he had not authorized any attorney to appear for him, and did not join in the application to set aside the judgment.

Both of these motions were heard on the twenty-first day of June, and an order was then made denying plaintiff's motion to amend the judgment, and, in accordance with that of defendant Rigney, setting the entire judgment aside, with leave to him to answer on the merits. From this order the plaintiff now appeals.

*E. B. Crocker*, for Appellant.

I. The Court had no power, right, or authority to set aside the judgment. The judgment in this case was rendered May 24th, 1861, during the term of said Court held in April and May, and the notice of motion to set it aside was not served or filed until the next term. The Court then had lost all power to set aside the judgment, though it could correct any clerical mistake. (4 Cal. 280; 5 Id. 486; 6 Id. 630; 8 Id. 521.)

II. The affidavit on which the motion was founded is clearly insufficient. It does not state that Rigney was in possession at the commencement of or during the suit, or that he ever was in possession. It states, in general terms, that he has a good defense to the action, but does not set forth the facts which would enable the Court to determine whether he had a good defense or not, and such a general statement of a mere conclusion amounts to nothing without showing the fact. (*Garner v. Marshall*, 9 Cal. 270; *Klink v. Cohen*, 13 Id. 624.)

III. The Court erred in setting aside the judgment as against Quigley. Quigley made no motion to set aside the judgment as against him, and he alone was competent to ask the Court to do so. If he is satisfied with the judgment, no one else has a right to complain for him.

No one has a right to open up the case against him and subject him to the risk of a new judgment, for an additional amount of costs, and for rents and profits, against his wishes and consent. This is so clearly erroneous that it is sufficient alone to reverse the order appealed from.

IV. The Court erred in refusing to correct the mistake in the judgment by striking out the name of Rigney and leaving it to stand as a judgment against Quigley alone. The fact that it was a mistake of the Clerk alone is clearly proved, and the plaintiff's attorney did all in his power to have the mistake corrected, both before the minutes were signed and afterwards. The records of the Court in showing that service had been had upon Quigley alone were sufficient to authorize the correction. When process is served only upon some of several defendants, and there is no appearance for the others, and judgment is taken against "the defendants," it will be taken as a judgment only against those served. (2 Bibb, 388; 2 S. & R. 280; 1 Cowen, 177; 10 Wend. 630; 10 Pick. 281.)

*F. Hereford*, for Respondent.

The sixty-eighth section of the Practice Act justifies the order of the Court. It provides, that "when from any cause the summons and a copy of the complaint in an action have not been personally served on the defendant, the Court may allow, on such terms as may be just, such defendant, or his



legal representative, at any time within six months after the rendition of any judgment in such action, to answer to the merits of the original action." There was no other way in which defendant could be relieved than that adopted by the Court.

In *Pico et al. v. Carillo et al.* judgment was rendered against two defendants, only one having been served; in that case the Court set aside the "judgment," and this Court affirmed the order. (*Pico et al. v. Carillo et al.*, 7 Cal. 31.)

True, Quigley does not ask to have the judgment set aside as to him. But this Court will not allow one defendant to permit judgment to go against him, by which his co-defendant is affected, when that co-defendant has not been served and knows nothing of the \*proceedings. Setting aside [272] the judgment would avail us nothing, unless it was set aside as an entirety.

NORTON, J. delivered the opinion of the Court—FIELD, C. J. and COPE, J. concurring.

This is an action of ejectment, in which the summons was served on the defendant Quigley, but not on the defendant Rigney—Quigley having suffered a default, judgment was entered against both defendants. Rigney then moved the Court to set aside the judgment, which motion was granted. The plaintiff appeals, and insists that Rigney could only ask to have the judgment set aside as to him. Although it may be that Rigney might have the judgment set aside as to him, yet we think he may have the only judgment in the case set aside if it has been taken against him without authority. There is no judgment against him alone; it is one judgment against the two defendants for the recovery of the premises and for damages, and to set aside the judgment as to him would in effect be setting aside the whole of that judgment and entering a new judgment against Quigley alone. As it now stands, the plaintiff has only to enter a new judgment against the defendant who has made default. Whichever the form the result is the same.

The parties seem to consider that the leave given Rigney to answer the complaint authorizes him to defend for both defendants. This is not so. The default of Quigley has not

been set aside, and if Rigney wishes to defend for Quigley as landlord, he must make an application for such leave. We do not intend to signify any opinion as to his rights in this respect, but only to remove the erroneous impression which appears to have occasioned this appeal.

Judgment affirmed.

On petition for rehearing, NORTON, J. delivered the following opinion—FIELD, C. J. and COPE, J. concurring.

A rehearing is asked in this case, on the supposition that the Court overlooked the fact that the term at which the judgment was entered had elapsed before the motion to set it aside was made, and also the fact that the entry of the judgment against both of the defendants was by a mistake [273] of the Clerk of the District Court. \*Although not specially explained in the opinion, they were not overlooked. Rigney not having been served with summons was entitled, under the sixty-eighth section of the Practice Act, to come in and be allowed to answer to the merits at any time within six months. It is not said in that section that the judgment will be set aside, yet it is a matter of course that the judgment may be set aside in order to let in a defense to the merits, unless the judgment is specially ordered to stand. In the case of *Bell v. Thompson*, 19 Cal. 706, we intimated an opinion that this portion of section sixty-eight was probably intended for the benefit of those against whom a judgment was taken regularly without personal service, as upon publication of summons, and in such case it would be proper to allow a party to come in and defend, allowing the judgment in the meantime to stand. But it has frequently been referred to as applying to cases of judgments entered erroneously without any service of summons or appearance of the defendant, and such cases, undoubtedly, are within its letter. We do not think it desirable now to refuse to apply this section to any case coming within its terms, by which application some relief may be obtained from the embarrassments arising from the decisions by which the District Courts are prevented from granting appropriate relief because the term at which the judgment was rendered has passed.

For the reason given in our former opinion, we think there

was no error in setting aside the whole judgment, nor do we think there was error in refusing to allow the amendment asked by the plaintiff at the time the motion to set aside was made. The accident of entering the judgment against both defendants happened to the prejudice, as it has turned out, of the plaintiff, but this not being corrected before the motion to set aside was made, we think, at least, it was a matter of discretion with the Court to allow the amendment or not.

Rehearing denied.

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\*MILLS *et al.* v. GLEASON *et al.* [274]

<sup>1</sup> **COMPLAINT ON UNDERTAKING.**—A complaint, in an action upon a statutory undertaking, which contains no other description of the instrument than an allegation that it corresponds with the provisions of a certain section of the Practice Act, is defective. The defect, however, being of form rather than of substance objection to it must be taken by demurrer to the complaint.

**UNDERTAKING IN REPLEVIN, LIABILITY OF SURETIES.**—The one hundred and seventy-seventh section of the Practice Act and the decisions under it, to the effect that the sureties upon the undertaking given by the plaintiff in a replevin action to procure a delivery of the property, are not responsible for a return of the property or its value unless a return was claimed in the answer and awarded by the judgment, do not apply to cases where the action is dismissed by the plaintiff before trial.

<sup>2</sup> **LIABILITY OF SURETIES ON DISMISSAL OF ACTION.**—The dismissal of a replevin action by the plaintiff before trial leaves the parties to settle in an action upon the undertaking those matters, including the right of defendant to a return of the property, which, had the original suit been prosecuted, must have been determined therein in the first instance. The opportunity to obtain a judgment for the return having been taken away by the failure to prosecute, defendant is entitled to recover, in an action on the undertaking, compensation in damages.

**IDEM.**—Where the replevin action is dismissed before trial, the liability of the sureties on the undertaking for a return of the property is not affected by the fact, that before the dismissal an answer had been filed in which no return of the property was claimed<sup>3</sup>

**APPEAL from the Fourth Judicial District.**

On the eighteenth day of April, 1856, one Gould commenced an action, in the Superior Court of San Francisco, against the present plaintiffs to recover certain personal pro-

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<sup>1</sup> See *Tissot v. Darling*, 9 Cal. 285; *Murdock v. Brooks*, 88 Cal. 596.

<sup>2</sup> Commented on and approved in *Clary v. Rolland*, 24 Cal. 152; *De Thomas v. Witherby*, 61 Cal. 99. See 90 Ind. 561.

erty, and in pursuance of the provisions of the statute for procuring an immediate delivery of the property made the proper affidavit and delivered to the officer an undertaking, executed by the present defendants, in the sum of five hundred dollars conditioned as required in the one hundred and second section of the Practice Act. The property was thereupon taken by the officer from the possession of the present plaintiffs and delivered to Gould. The defendants in the replevin suit (plaintiffs here) filed an answer therein in which they did not claim any return of the property to them. When the case came on for trial Gould the plaintiff failed to appear, and a judgment was entered dismissing the action for want of prosecution and in favor of defendants for their costs.

[275] \*The present action is brought upon the undertaking executed by the sureties in the replevin suit. The complaint sets up the proceedings in that suit and claims a recovery for the value of the property, (which it avers has never been returned,) with interest thereon, and also for the costs which were adjudged them in the replevin suit. The complaint does not contain a copy of the undertaking or any averments as to what it contained, except that it was made in pursuance of the one hundred and second section of the Practice Act, was in the penal sum of five hundred dollars, and was conditioned as required by that section. Defendants, without demurring, answered, and a trial was had before the Court without a jury. The Court found the facts substantially as above set forth, and that the value of the property at the time of the taking was three hundred dollars, and gave judgment for plaintiff for this amount and the amount of the judgment for costs in the replevin suit with interest. Defendants moved for a new trial which was denied, and from this order and the judgment they now appeal

*F. A. Fabens, for Appellants.*

I. The complaint does not state facts sufficient to constitute a cause of action.

1. There is no sufficient allegation as to the undertaking sued upon. The undertaking is not set forth in *hæc verba*, neither is the tenor of it described. 2. There is no allegation in the complaint that the plaintiffs have suffered any

damage by reason of Gould's failing to prosecute his replevin suit described in the complaint. The complaint shows that there were no damages found in the replevin suit against Gould for the taking alleged. Damages for the original taking and detention should have been found in the replevin suit: not having been so found, they cannot be recovered of the sureties. (*Gianuca v. Atwood*, 8 Cal. 446.) 3. It does not appear from the complaint that the property claimed in the replevin suit has not been returned to the plaintiffs.

II. In an action against the sureties upon an undertaking in a replevin suit, the judgment in the replevin suit is the only measure of damages. (*Chambers v. Waters*, 7 Cal. 398; *Gould v. Scannel*, 13 Id. 430; *Nickerson v. Chatterton*, 7 Id. 568.)

\*III. Where, in an action to recover personal property, the answer contains no allegation nor prayer relative to the change of possession from defendant to plaintiff, then neither a judgment for a return of the property, nor for the value of it, in case a return cannot be had, can be obtained either upon a trial of the case, or upon a judgment of dismissal against the plaintiffs for failure to appear. (*Gould v. Scannel* and *Chambers v. Waters*, *supra*.) [276]

IV. Where, in a replevin suit, the plaintiffs fail to appear and a judgment of nonsuit is entered against them, and a suit brought upon the undertaking given in such suit, then in the suit upon the undertaking the jury can find only such facts as the jury in the original replevin suit might have found if the replevin suit had been prosecuted. If such replevin suit had been prosecuted, and the plaintiffs had failed therein, his sureties in a suit brought against them are only liable for the amount of such judgment as might have been obtained against the plaintiffs in the replevin suit, if the same had been fully tried, and a verdict rendered against the plaintiffs. If Gould had prosecuted his suit and lost it, from the nature of the pleadings in that case no judgment for the return of the property, or its value, could have been obtained against him, therefore no such judgment can be obtained in this case against the defendants. (7 and 13 Cal. above cited.)

*John Reynolds*, for Respondents.

I. The cases in this Court cited by appellants do not sustain their position. In the case of *Gould v. Scannel*, this Court held that where a return is not claimed in the answer, no return can be adjudged on a trial, and the Court reversed that part of the judgment which awarded the value of the property. That part of the judgment was erroneous, because, there being no claim for a return, or anything in the answer in the nature of a counter-claim, and the defendants not appearing, there could be no trial. The case could only be dismissed for want of prosecution.

The case of *Nickerson v. Chatterton*, 7 Cal. 568, was a suit upon an undertaking given by the defendant, under the one hundred and fourth section of the Practice Act, and contained no condition like the one for the breach of which [277] the plaintiffs seek to \*recover in this case. The only condition in that undertaking was for the delivery of the property to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may from any cause be recovered against the defendant. This authority, therefore, can have no application to the case at bar. In the case of *Chambers v. Waters*, 7 Cal. 390, there was no breach of the condition "for the prosecution of the action," nor was there any breach of the other conditions in the bond, for they both depended upon the judgment of the Court. The sureties in that case undertook as follows: 1st, for the prosecution of the action; 2d, for the return of the property, if return thereof be adjudged. No return was adjudged, and there was, therefore, no breach of the second condition; 3d, for the payment to him of such sum as may from any cause be recovered against the plaintiff. The amount of the recovery was the costs which were paid, and thus the third condition satisfied, and no condition of the bond broken, of course no action could be maintained upon it.

In the case of *Ginaca v. Atwood*, 8 Cal. 446, there was a trial. The plaintiff appeared and prosecuted his suit, and there was therefore no breach of the first condition in the bond. A return of the property was adjudged and not fully made. This Court hold that the sureties on the bond were liable to the extent of the breach; they could not, of course, be liable beyond that. Neither the second nor third condi-

tions in the bond, provided for by section one hundred and two, can be held to refer to the original taking unless so determined by the judgment, and hence this Court say: "It is for damages arising from a failure to return the property that the action will lie, not for damages for the original taking and detention; these both should have been found in the replevin suit. Not having been so, they cannot be recovered of the sureties." The only condition broken in this case was, for a compliance with the judgment in the replevin suit. But if there is no trial—and there can be none if the plaintiff fails to prosecute his action—there can be no such judgment, and no breach of the second or third condition, but the defendant is compelled to seek his remedy upon the first condition for a failure to prosecute the action. In the case at bar there was a breach of the first condition of the bond, viz.:

"For the prosecution of the action." The measure [278] of damages for a breach of this condition is the value of the property when taken, and lawful interest thereon from the date of such taking. The property was taken from the possession of the defendants in the replevin suit (respondents here) on the giving of this undertaking. The taking of the property from the respondents was the immediate result of the giving of the undertaking. (*Roman v. Stratton*, 2 Bibb, 199.)

This rule of damages is manifestly just. As to the plaintiff being entitled to interest on the value, either as an absolute right or as damages which may be assessed by the jury, see *Kyle v. Lawrence Railroad Co.*, 10 Richardson's L. R., S. C., 382; *Dana v. Fiedler*, 2 Kern. 40.

It is objected that the complaint does not show that the property has not been returned to the plaintiff. If it had been returned, it was for the defendants to plead it in discharge. It having been taken and no judgment for a return, it must be presumed that it was kept.

II. The averments of the complaint in this case are sufficient. The complaint avers that the undertaking was that provided for in the one hundred and second section of the Practice Act, and that it was in the penal sum of five hundred dollars. The averment that the undertaking was in the penal sum of five hundred dollars, and conditioned as pro-

vided in section one hundred and two, is equivalent to averring that the undertaking was conditioned for the prosecution of the action, for the return of the property to the defendant, if a return be adjudged, and for the payment to him of such sum as may from any cause be recovered against the plaintiff. This section enters into and forms part of the averment. In *Nickerson v. Chatterton*, 8 Cal. 570, this Court hold that "the law under which an undertaking is given forms part of the undertaking." In *Mattoon v. Eder*, 6 Cal. 59, this Court say: "The principle is now familiar, that where parties contract in respect to a law, the law itself becomes a part of the contract, and they are bound thereby."

COPE, J. delivered the opinion of the Court—FIELD, C. J. and NORTON, J. concurring.

[279] \*This is a suit upon an undertaking executed by the defendants in pursuance of section one hundred and two of the Practice Act. The only description of the undertaking in the complaint is, that it corresponds with the provisions of that section, and it is objected that in this respect the complaint is defective. It is claimed that the material portions of the undertaking should have been set forth, either literally or according to their legal effect; and there is no doubt that the mode of statement adopted is not sanctioned by the rules of pleading. A reference to the statute can hardly be considered equivalent to a direct averment of the facts; but we are of opinion that the objection should have been taken by demurrer. The defect is rather of form than of substance, and in the absence of a demurrer we do not regard it as sufficient to reverse the judgment.

The undertaking was executed in an action of replevin, brought by one Gould against the present plaintiffs. A question is raised as to whether the value of the property can be recovered as damages, the counsel for the appellants insisting that the damages are to be measured by the judgment in the action of replevin. The undertaking is conditioned "for the prosecution of the action, for the return of the property to the defendants, if return thereof be adjudged, and for the payment to them of such sum as may for any cause be recovered against the plaintiffs." The action was dismissed for want of



prosecution, and a judgment entered in favor of the defendants for costs, and the position taken is that the amount of this judgment constitutes the measure of the relief to be administered. There are several decisions of this Court holding that a defendant in replevin, in order to render the sureties upon the undertaking liable for the value of the property, must demand a return in the answer, and obtain a judgment directing it. In *Chambers v. Waters*, 7 Cal. 390, the Court said: "In the case between Waters and Hill, if the latter intended to hold Waters and his sureties responsible upon the undertaking, either for a return of the property or its value, he should have claimed a return, and taken his judgment accordingly. Having failed to do this, the payment of the judgment, as taken, is a complete discharge," etc. There are other cases to the same effect; but in *Ginaca v. Atwood*, \*8 Cal. 446, where a nonsuit had been granted, it was [280] held that section one hundred and seventy-seven of the Practice Act, upon which the previous decisions were based, did not apply. The section provides that "In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant, by his answer, claim a return thereof, the jury, if their verdict be in favor of the plaintiff, or if, being in favor of the defendant, they also find that he is entitled to a return thereof, shall find the value of the property, and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property." A dismissal stands upon the same footing as a nonsuit, leaving the parties to settle in an action upon the undertaking those matters which, if the original suit were prosecuted, it would be necessary to determine in the first instance. Such matters include, of course, the right of the defendant to a return of the property, and as the opportunity to obtain a judgment for its return is taken away by the failure to prosecute, he is entitled to compensation in damages. A failure to prosecute is a breach of the undertaking, and the legal and necessary result is that the sureties to the undertaking are liable for whatever injury the defendant has sustained. In this case it appears that a return of the property was not demanded in the replevin

suit, but we think the defendants are not in a position to take advantage of this point. The suit was not tried, but abandoned and dismissed, and under the circumstances it is immaterial what the pleadings in the case were.

Judgment affirmed.

### SPEYER v. IHMELS & CO.

<sup>4</sup> **SUBSEQUENT ATTACHING CREDITOR, WHEN MAY INTERVENE.**—In an action to recover money in which an attachment has been issued and levied upon property of the defendant, a subsequent attaching creditor may intervene at any time before the entry of judgment for the purpose of contesting the validity of the first attachment. *Davis v. Eppinger*, 18 Cal. 378, affirmed on this point.

[281] **IDEM.**—\*Where a subsequent attaching creditor intervenes in an action for the purpose of setting aside an attachment issued therein, on the ground that there is no debt due from the defendant to the plaintiff, the allegations in the pleading on the part of the intervenor traversing the complaint, have the same effect as denials in an answer and require affirmative proof by the plaintiff of his cause of action, in default of which the intervenor will have judgment in his favor.

**ERROR AFFECTING RIGHTS OF PARTIES NOT APPELLANTS.**—A judgment will not be reversed because of an error which affects the rights of parties who have not appealed, and not those of the appellants.

**POSTPONEMENT OF LIEN.**—Action commenced by attachment to recover an alleged indebtedness, and defendants made default; before the entry of judgment, certain subsequent attaching creditors intervened and contested the validity of the plaintiff's attachment, on the ground that no debt was really due from plaintiff to defendant. On the issue thus raised the Court found in favor of the intervenors, and thereupon entered an order setting aside the attachment of plaintiff: *Held*, that the order was erroneous in entirely setting aside the plaintiff's attachment, and must be modified so as merely to postpone the plaintiff's lien to that of the intervenors.

**NEW TRIAL ON INTERVENTION.**—Where the merits of the case were not investigated in the lower Court by reason of an uncertainty as to the proper mode of proceeding under the anomalous provisions of the Practice Act relating to interventions, the Supreme Court awarded a new trial, although the decision of the Court below upon the main question involved was approved, and the only error disclosed might have been cured by a direction to modify the judgment.

### APPEAL from the Sixth Judicial District.

On the tenth day of January, 1861, appellant, Morris Speyer, commenced a suit against Ihmels & Co. in the Dis-

<sup>4</sup> Cited as authority in *McComb v. Reed*, 28 Cal. 287; *Cohn v. Goldstein*, Oct. T. 1863 (not reported.)

trict Court, Sixth Judicial District, for the sum of \$5,400, claimed to be due on an account for goods sold, and caused an attachment to be issued and levied by the Sheriff of Sacramento County on property of the defendants in that county. On the same day, and immediately after the commencement of the suit of Speyer, the intervenors, Eggers & Co., also commenced an action against the same defendants for \$8,500, issued an attachment therein, and had it levied upon the same property. On the ninth of January, 1861, the intervenor, E. L. Goldstein, commenced an action against the same defendants in the Twelfth District Court to recover the sum of \$8,450, and caused an attachment to be issued therein directed to the Sheriff of the City and County of Sacramento, who levied the same upon the property previously attached.

The defendants made default in all of these actions. On the nineteenth day of January, 1861, the intervenors, Goldstein and \*Eggers & Co., filed in the Sixth Dis- [282] trict Court, in the case of *Speyer v. Ihmels & Co.*, bills of intervention, under the six hundred and fifty-ninth section of the Practice Act, alleging: 1st, That the intervenors were creditors of the defendants for the respective amounts due them, and had caused attachments to be issued and levied upon their property subsequent to the attachments of Speyer; 2d, that Ihmels & Co. were insolvent; 3d, that the claim and demand upon which suit of Speyer is based is not a joint or partnership debt against defendants, but an individual debt due from one Stockfleth, a member of the firm; 4th, that the pretended claim of Speyer was not due, and no right of action had accrued thereon at the commencement of his action; 5th, that no goods, wares, or merchandise were ever sold or delivered by the plaintiff to defendants as charged in his complaint; 6th, that Speyer's claim was brought forward and his action commenced and prosecuted by a collusion between him and the defendants, for the purpose and with the intent to defraud the creditors of defendants, including the intervenors.

The intervenors prayed that the attachment of plaintiff, so far as the rights of the intervenors were concerned, be set aside and dismissed, and that they be adjudged entitled to the money in the hands of the Sheriff collected upon the sale

of the property, and that the Sheriff be directed to pay the same to them *pro rata*. To these pleadings of the intervenors plaintiff demurred, and the demurrer being overruled, filed answers denying all their allegations of fraud. The case was submitted to the Court, a jury being waived. The plaintiff read his complaint, and after proving that he had asked the Clerk for a judgment against said defendants by default, and that the Clerk had refused to enter it, rested.

The intervenors then read their bills of intervention, and introduced in evidence the attachment papers in their respective cases and the Sheriff's return upon their writs, and also the judgments recovered in said actions for the amounts sued for, and rested.

The plaintiff introduced no further proof. The Court rendered judgment in favor of the plaintiff, and against the defendants, for the amount sued for; and in favor of the intervenors so far as to set aside and discharge the [283] plaintiff's attachment, and to order the \*Sheriff to pay to them the money in his hands. From this judgment the plaintiff appeals.

*F. Hereford*, for Appellants.

I. The demurrer to the bills of intervention should have been sustained. The petitioners simply show that they were contract creditors. In the language of this Court in the case of *Horn v. The Volcano Water Company et al.*, 13 Cal. 69, the intervention "is only an attempt of one creditor to prevent another creditor obtaining judgment against the common debtor." Our statute very plainly and distinctly points out in what cases a party may intervene. It says: "A party shall be entitled to intervene in an action who shall have an interest in the matter in litigation." (Pr. Act, sec. 659.) Now what is the matter in litigation in the present case? It is simply whether the plaintiff shall have judgment for his debt. The intervenors have no interest in that question within the meaning of the statute. If this were a replevin suit, or any other kind of suit by which plaintiff sought to obtain possession of certain specific property, a party upon making a proper showing might intervene. It was for such a class of cases only that the statute intended to provide. (*Gasquet v. Johnson*,

1 Louisiana, 431.) Would the intervenors gain or lose by the direct legal effect of the judgment? Certainly not. In *Horn v. Volcano Water Co.* this Court use the following language: "To authorize an intervention, therefore, the interest must be that created by a claim to the demand, or some part thereof in suit, or a claim to or lien upon the property, or some part thereof, which is the subject of litigation." Now, did the intervenors "have a claim to the demand?" This is not pretended. Did they have any claim to or lien upon the property which was the subject of litigation? Certainly not. There was no property in litigation as between Speyer and his debtor, Ihmels & Co. The only question in dispute was, did Ihmels & Co. owe Speyer so much money, in which the intervenors had no such interest as would allow them to intervene?

II. The Court erred in setting aside Speyer's attachment, and ordering the proceeds of the property attached to be paid over to the intervenors. The affirmative was not on Speyer. The bill of intervention is treated by our [284] statute and the decisions of our Courts as a complaint. (Prac. Act, sec. 661; *People v. Talmage*, 6 Cal. 256.) At the time of trial both parties stood on an equal footing—neither party offering any evidence. It is true the intervenors had their judgments. Speyer did not have his judgment, for the reason that the Clerk refused to enter it up. The intervenors introduced no evidence to support any one of the allegations in their complaint of intervention: the Court had no more right to presume against the *bona fides* of our claim than that of the intervenors. To the bill of intervention Speyer filed his answer denying all their charges of fraud, etc. It was necessary for the intervenors to allege certain facts in order that they might gain a status in Court. It was certainly necessary then for them to substantiate those facts in order to maintain that status. If it was necessary for them to allege those facts, it certainly was necessary for them to prove them. The intervenors had the affirmative of the issue before the Court, and the *onus probandi* was on them. (1 Greenl. Ev. sec. 74.) The intervenors ground their right upon an affirmative allegation of fraud and collusion; that they must prove, for the law never presumes fraud. (Id. sec.

80; *Ford v. Metayer*, 10 Martin, 436; *Turnbull v. Martin*, Id. 419; Philips on Evidence, C. & H. Notes, 3d ed., 641, 649; 652; 18 Johns. 403; 1 Washington, 306, 330; 7 Cow. 701.)

Geo. R. Moore and E. B. Crocker, for Respondents.

I. Respondents had a right to intervene. (*Davis v. Eppinger*, 18 Cal. 378; *Brooks v. Hager*, 5 Id. 281; *Yuba County v. Adams & Co.*, 7 Id. 35; *Dixey v. Pollock*, 8 Id. 570; *Horn v. Vol. Water Co.*, 13 Id. 68.)

II. We deny in our petitions of intervention that the plaintiff ever sold or delivered any goods, etc., to the firm of Ihmels & Co., or that they are indebted to him jointly in any amount whatever, but, on the contrary, we aver that all of the plaintiff's transactions were with Stockfleth, one of the partners, individually, and that he alone is liable. Here is a distinct issue of fact for the Court to determine; and unless the plaintiff can show that he did sell and deliver goods, etc., to the firm, he cannot recover in this action, [285] \*and, of course, would not be entitled to the partnership assets. If it were true that the plaintiff sold these goods to the firm of Ihmels & Co., he could easily have shown that fact, while it would have been the next thing to impossible for us to have shown that he did not. The true rule is, that an intervenor must establish the affirmative allegations in his bill, as against either party, but when he "unites with the defendant in resisting the claims of the plaintiff," and denies the averment in the plaintiff's complaint, he stands with and to this extent occupies the place of the defendant, and with respect to these issues, the plaintiff must make out his case affirmatively or he will fail. The language of the statute clearly fixes the relative positions of the parties. The intervenor may "unite with the defendant in resisting the claims of the plaintiff." That is, he may become a defendant in the intervention, and then, of course, he will occupy the same position with respect to the plaintiff as any other defendant occupies, and it would be a radical change, indeed, in the practice to hold that a plaintiff should not be required to make out an affirmative case when each averment in his complaint is specifically denied.

In Louisiana, where the statute is very similar to ours, the

Courts hold that bills of intervention, so far as they traverse the complaint, must be regarded like the answer of a defendant, and put in issue the plaintiff's allegations. (*Neal v. Fesperman*, 1 Jones, La., 446.)

This Court took the same view in the case of *Horn v. The Volcano Water Co. et al.*, 13 Cal. 70. In that case the Court said: "Looking, then, to the position of these judgment creditors, and treating it as an answer to the complaint, and the parties as asserting a priority in the liens of their several judgments over the lien of the mortgage," etc.

In the case of *Davis v. Eppinger*, 18 Cal.—Kloppenstein intervening—which was similar in all of its material parts to the case at bar, this Court held substantially the same rule. (See, also, 1 Greenleaf's Ev. sec. 74; *C* and *H*, notes to Philip's Ev. 810.)

NORTON, J. delivered the opinion of the Court—FIELD, C. J. concurring.

\*This is a case arising under the provisions of the [286] Civil Practice Act relative to interventions.

On the tenth of January, 1861, the plaintiff commenced his action, and caused an attachment to be levied upon the property of Ihmels & Co. On the same day Eggers & Co. commenced an action against the same defendants, and caused an attachment to be levied upon the same property, but subsequent to the plaintiff's levy, and in due course obtained judgment. On the day previous E. L. Goldstein had commenced an action against the same defendants, and caused an attachment to be levied upon the same property, but also subsequent to the plaintiff's levy. Before a default was entered against the defendants in this action, E. L. Goldstein and Eggers & Co. severally filed interventions setting forth these facts, and also averring that the property attached was only sufficient to satisfy the plaintiff's claim, and also charging that the plaintiff's demand was not due at the time he commenced his action, and also that he had no valid demand against the defendants, and that his action was prosecuted for the purpose of hindering and defrauding creditors of the defendants. A general demurrer was interposed to these complaints of intervention; that is, that the

facts set forth do not constitute a cause of intervention. The demurrer was overruled, and then the plaintiff answered the interventions, and upon the action coming on for trial, after the intervenors had made proof of their attachment proceedings, and the plaintiff had shown the default of the original defendants, each party moved the Court for judgment in his favor, without giving further evidence, and thereupon the Court found in favor of the plaintiff against the defendants and in favor of the intervenors against the plaintiff, and adjudged that the plaintiff recover the amount of his demand against the defendants, and that his attachments be set aside, and that the Sheriff pay over the money in his hands to the intervenors *pro rata*. From this judgment the plaintiff appeals. The two main points presented are: 1st. Whether the facts show a case for a proceeding by intervention; and 2d, whether the *onus probandi* was on the plaintiff to prove his cause of action as between him and the intervenors, or on the intervenors to prove their cause of action against the plaintiff.

[287] \*The provisions of the Practice Act relating to interventions were not a portion of the system of proceedings in civil cases as originally enacted, but were adopted in 1854 from the laws of Louisiana. In a case like the present, before the introduction of these provisions, and as doubtless may still be done, the proceedings would have been by a separate action in the nature of a bill in chancery, as in the case of *Heyneman v. Dennenberg*, 6 Cal. 376, or by motion to the Court, as in the case of *Dixey v. Pollock*, 8 Id. 570. But in the case of *Davis v. Eppinger*, 18 Id. 378, where the facts were like those in this case, it was decided to be a proper case for intervention. Although the intervenors have not a claim to or lien upon any property which is the direct subject of litigation in this action, they have a lien upon property which is held subject to the results of the litigation, and which would be lost to the intervenors if the original action should proceed to judgment and execution. If the case does not fall within the precise definition of the cases in which intervention takes place, as given in section six hundred and fifty-nine, and as explained in the case of *Horn v. Volcano Water Works*, 13 Cal. 62, it is substantially within the object pro-



vided for by that section, and as that is a law only regulating modes of procedure and not affecting rights of property, we think the interpretation given to it in the case of *Davis v. Eppinger* should not be changed.

The second point, we think, is also controlled by the decision which establishes the right to intervene. The ground upon which the intervenors are allowed to become parties to this action is, that by reason of their lien upon the property attached, they are interested in preventing the plaintiff recovering a judgment. They are for this purpose defendants in the action, and as the allegations in their complaint, aside from those made for the purpose of showing their right to intervene, are in effect a denial that at the time the plaintiff brought his action and attached the property he had any cause of action, in order to obtain a judgment, so far as they were interested, after they had proved the facts alleged to show their right to intervene, he was required to prove his cause of action. Although in the case of *Davis v. Eppinger* and in the case of *Horn v. The Volcano Water Co.*, 13 Cal. 70, it was decided that \*judgment might be rendered against [288] the original defendants, it was because under our system the Court by its judgment can make various dispositions to meet all the exigencies of the case, and thus allow the plaintiff to recover a judgment against those defendants and at the same time control the judgment so far as it would affect the intervenor's liens upon the property.

The objection that the judgment should not have directed the money in the Sheriff's hands to be paid to the intervenors *pro rata*, cannot avail the appellant, because it is a matter in which he is not interested, and those who are interested in it have not appealed.

But a judgment having been rendered for the plaintiff against the original defendants, that portion of the judgment which sets aside the plaintiff's attachment absolutely was erroneous. It should only have been postponed to those of the intervenors. In this respect the judgment must be modified.

The record in this case appears to have been made up amicably between the attorneys, and some of its defects supplied by stipulations, and neither in the grounds of error

or in the briefs is any distinction taken between the cases of the intervenors, although there appears to be a difference which might have required a modification of the form of the judgment, but not in a matter affecting the substantial rights of the plaintiff, who alone has appealed.

The cause must be remanded to the Court below, with directions to modify the judgment by striking out that portion which directs the attachment of the plaintiff to be set aside, and by directing the money in the Sheriff's hands to be applied first to the payment of the judgments of the intervenors *pro rata*, and the surplus, if any, to the payment of the plaintiff's judgment. Each party to pay his own costs on appeal.

On rehearing, NORTON, J. delivered the opinion of the Court—FIELD, C. J. concurring.

We granted a rehearing in this case principally for the purpose of considering whether our decision might not be modified so-as to allow the parties a new trial. The merits of the case were not investigated, and as this was occasioned [289] by an uncertainty as to the \*proper mode of proceeding under the anomalous provisions of the Practice Act relating to interventions, we think there should be a new trial. In other respects, we adhere to our opinion as heretofore expressed.

The judgment is therefore reversed, and the cause remanded for a new trial. The costs of this appeal to abide the event.

**JANUARY TERM, 1863.**



REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT,

JANUARY TERM, 1863.

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KEANE *v.* CANNOVAN *et al.*

**EMPOWERM.—EVIDENCE OF EXTENT OF BOUNDARIES.**—Where the plaintiff in ejectment relies upon prior possession as evidence of title, a deed of the premises to him from one not shown to have had at the date of its execution either title or possession is admissible evidence, in connection with proof of entry and occupation under it, to show the extent and boundaries of the premises of which possession was claimed.

**TAX DEED AS EVIDENCE.**—The statute which makes a tax deed *prima facie* evidence of the transfer of the title of the delinquent, applies only to deeds executed upon a sale for taxes levied subsequent to its passage. A tax deed executed previous to the passage of the statute, is not admissible as evidence of title without proof that all the requirements of the law authorizing its execution had been complied with.

**OFFICER.—PRESUMPTION AS TO PERFORMANCE OF DUTY.**—Where an officer, in making a sale of property, acts under a naked statutory power with a view to divest, upon certain contingencies, the title of the citizen, the purchaser relying upon the execution of the power must show that every preliminary step prescribed by the law has been followed. No presumption is in such case to be indulged that the officer has performed his duty, or complied with the law.

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<sup>1</sup> Cited as authority in *Hicks v. Coleman*, 25 Cal. 139; *Kile v. Tubbs*, 23 Cal. 437; *Davis v. Perley*, 30 Cal. 636. And see as to doctrine of constructive possession, *Hoag v. Pierce*, 28 Cal. 187; *McKee v. Greene*, 31 Cal. 418; *Ayers v. Bensley*, 32 Cal. 620; *Walsh v. Hill*, 38 Cal. 487; *Cannon v. Union Lumber Co.*, 38 Cal. 674; *Wolfskill v. Malajovich*, 39 Cal. 280; *Hughes v. Hazard*, Oct. T. 1871 (not reported); *Donahue v. Gallavan*, April T. 1872 (not reported.)

**PRESUMPTION AS TO COMPLIANCE WITH LEGAL FORMALITIES.**—The rule by which a presumption of compliance with legal formalities in a sale by officers, or trustees, is sometimes raised by lapse of time with possession in the purchaser, only authorizes the presumption as to intermediate steps in the proceeding. That which [292] is the foundations of the authority to sell, as well as the execution of the deed by which the sale is consummated, is not within the rule, and must in all cases be proved.

**IDEM.**—Thus, if from lapse of time since the execution of a tax deed and possession by the purchaser under it, presumptions could be indulged in support of any of the preliminary acts essential to the exercise of the power of sale, they could only be in favor of the acts between the assessment and the execution of the deed, and not of the assessment itself, which was the foundation of all subsequent proceedings.

**EJECTMENT—TAX TITLE.**—Where in an action of ejectment the defendant claimed title under a tax sale, and to prove an admission of title in him by plaintiff, offered in evidence a complaint in an action by the plaintiff against a third person, in which it was averred that in consequence of the neglect of the plaintiff's agent the premises were sold for taxes and no redemption was made, and that the sale thereby became absolute, in consequence of which neglect of the agent the plaintiff had sustained damage: *Held*, that the complaint was inadmissible for that purpose; that the statements in it did not amount to an admission of title, and that even if they did the admission would not operate to transfer such title.

**DESCRIPTION OF PROPERTY IN DEED.**—The description of property in a tax deed must be certain of itself, and not such as to require evidence *aliunde* to make it certain.

**IDEM—DEED VOID FOR UNCERTAINTY.**—A tax deed in which the property is described as follows: "A lot on Dupont Street, one hundred and thirty-seven feet and six inches from the north-west corner of Washington Street, with the improvements thereon 12x100," is void for uncertainty of the description.

**ABANDONMENT NOT SHOWN BY FAILURE TO PAY TAXES.**—The payment of taxes by the grantee in a tax deed upon the property for a portion of the time he is in possession, claiming title under the deed, is not by itself, disconnected from other circumstances, evidence that the owner has abandoned the property.

**ABANDONMENT INFERRED FROM LAPSE OF TITLE.**—An abandonment may in some cases be inferred from the lapse of time and the delay of the first occupant in asserting his claim to the possession against parties subsequently entering upon the premises, but in such cases the leaving of the premises must have been voluntary, and without any expressed intention to resume the possession.

**AGENCY TO REBUT PRESUMPTION OF ABANDONMENT.**—The fact that a party, when ceasing to occupy premises, left an agent in charge of them, is of itself sufficient to rebut the presumption of abandonment arising from the cessation of his occupancy, and to render the question of abandonment one of intention proper for determination by a jury from the circumstances.

**EJECTMENT—TITLE UNDER VAN NESS ORDINANCE.**—A defendant in ejectment for a lot in San Francisco, who had possession of the premises on the first day of

<sup>2</sup> Cited as authority in *Garwood v. Hastings*, 38 Cal. 224; *People v. Mahoney*, 55 Cal. 288.

<sup>3</sup> Title by possession and abandonment, cited as authority in *Moon v. Rollins*, 36 Cal. 339; and see *Wilson v. Cleveland*, 30 Cal. 202; *St. John v. Kidd*, 26 Cal. 272; *Richardson v. McNulty*, 24 Cal. 354; *Myers v. Spooner*, 55 Cal. 261.

Doctrine of constructive possession under deed, affirmed in *Walsh v. Hill*, 38 Cal. 487, citing numerous authorities; and see *Cannon v. Union L. Co.*, 38 Cal. 674; *Wolfskill v. Malajowich*, 39 Cal. 280.

<sup>4</sup> See *Wolf v. Baldwin*, 19 Cal. 30; *Polac v. McGrath*, 32 Cal. 15; *Judson v. Malloy*, 40 Cal. 299.

January, 1855, and thence up to the introduction of the Van Ness Ordinance, cannot invoke the protection of that ordinance when the issue in the action is whether his possession was acquired by an intrusion upon the prior rights of the plaintiff.

**POSSESSION EVIDENCE OF SEIZIN IN FEE.**—The possession of real property is evidence of seizin in fee in the possessor, and no further or higher evidence of title is required to enable a party claiming through the possessor to recover in ejectment until the defendant shows an anterior possession, or traces title from a paramount source.

**TENANT IN POSSESSION LIABLE FOR RENT.**—\*A tenant in possession of premises, [293] who is sued in ejectment, is not released from liability to the plaintiff for the use of the premises from the fact that he has paid rent to his landlord. If compelled to pay any further sum by the action, he can have recourse upon his landlord for the same

### APPEAL from the Twelfth Judicial District.

This was an action of ejectment to recover a lot of land situated within the City and County of San Francisco. The complaint was filed April 10th, 1860. On the trial the plaintiff introduced and gave in evidence the following instruments:

1. A power of attorney from J. B. Bayerque to Francois L. A. Pioche, dated August 20th, 1859, authorizing and empowering the said attorney to sell and convey the premises in controversy.

2. The deed of the premises from J. B. Bayerque, by Pioche his attorney, to the plaintiff, acknowledged and recorded March 23d, 1860.

3. The judgment and decree of the District Court, entered on February 11th, 1857, in an action wherein J. B. Bayerque was plaintiff, and Sothereo Driard and Jean Branger and others were defendants, which action was brought to foreclose a mortgage executed by the defendants Driard and Branger, covering the premises in controversy, and by which judgment and decree the premises were ordered to be sold to satisfy the amount found due to the plaintiff in said action, the holder of the mortgage, which amount exceeded \$4,000.

4. An order, dated February 18th, 1857, issued upon said judgment and decree out of the said Court under the seal thereof, directed to the Sheriff of the City and County of San Francisco, directing a sale of said premises.

5. The certificate and return of the said Sheriff upon said order, showing a sale of said premises on the twelfth of March, 1857, and the purchase of the same at said sale by the said J. B. Bayerque

6. A deed embracing the premises in controversy executed by the Sheriff to the said Bayerque, bearing date Sept. 14th, 1857.

7. A deed embracing the premises in controversy executed and delivered by Francois Mondolet to the said Driard [294] and Branger, \*dated March 3d, 1853, and which was duly acknowledged and recorded on the same day.

8. A deed from Philip Ramirez to Francois Mondolet covering the premises, bearing date April 3d, 1851, and recorded January 24th, 1852.

The plaintiff then proved that Mondolet was in the possession of the premises in the latter part of 1850 and the first part of 1851; that he had a two story frame building on the premises in which he kept a restaurant, which was carried on by himself; that he occupied the premises up to June, 1851, when the building was burned down; that the defendants were in possession of the premises at the commencement of the action, and that the value of their use and occupation since then was fifty dollars per month.

On the part of the defendants it was proved that Dumartheray, one of them, went into the possession of the premises in the summer of 1852, and that he and parties claiming under him have continued in the possession ever since. After producing the tax deed of 1851, mentioned by the Court in its opinion, the defendants offered to prove the payment of taxes on the lot by Dumartheray since 1852, except for the years 1857 and 1858, as evidence of his claim as owner of the premises, and to show an abandonment of them by Mondolet. Upon objection of the plaintiff, the proof offered was excluded, and the defendants excepted. The defendants also offered to prove the value of the improvements upon the premises, but upon objection of the plaintiff, the proof was excluded, on the ground that there was nothing in the pleadings to authorize its introduction. The answer did not make any reference to the existence of any improvements upon the premises.

The Court charged the jury as follows: "That the question before them was one of prior possession, as neither party showed any documentary title from the city; that if they find that Mondolet was in possession prior to the defendants' pos-



session, it was sufficient to maintain the action, unless that possession was abandoned; that the question of abandonment was one of intention of which they were to judge exclusively; that in order to do so, they must take into consideration all the facts and circumstances before them in evidence; that the Van Ness Ordinance had no application at \*this time to determine the cause in favor of either [295] party in this suit."

The plaintiff obtained a verdict. A motion for a new trial was made on various grounds, and among others for alleged insufficiency of the evidence to justify the verdict, and was overruled. All other material facts appear in the opinion of the Court. The defendants appeal.

*Earl Bartlett*, for Appellant.

I. The Court erred in allowing the deed from Ramirez to Mondolet to be read in evidence when no title was shown in the former. (*Iunes v. Steamer Senator*, 1 Cal. 462; *Mateer v. Brown*, Id. 224.)

II. The Court erred in refusing to allow the tax deed of Buckingham, the Treasurer of the County of San Francisco, to Dumartheray, and the complaint in the case of *Mondolet v. Dufan*, to be read in evidence.

1. These papers showed the title had passed to the defendant by virtue of the tax deed. (*Jackson v. Philips*, 9 Cow. 110; *Hartwell v. Root*, 19 John. 345; *Sternberg v. Heoffer*, 11 Id. 513.)

2. Said deed being ten years old, the correctness of all proceedings in the assessment and sale of the lot, coupled with defendants' possession, were to be presumed. (*Matthew's Presumptive Evidence*, 271-277; *Johnson v. Emerson*, 4 Pick. 160; *Thomas' Lessee v. Horlacker*, 1 Dal. 14; *Green v. Covillaud*, 10 Cal. 331; *Brown v. Covillaud*, 6 Id. 571.)

3. Said deed, together with said complaint offered, constituted an admission of title in the defendant Dumartheray. (*Hurler v. Hays*, 3 Cal. 306; *Tartar v. Hall*, Id. 266; *Parke v. Kilham*, 8 Id. 79; *Burnett v. Dickinson*, Id. 115; *Mitchell v. Reed*, 9 Id. 205; *McGee v. Stone*, Id. 606; *Snodgrass v. Ricketts*, 13 Id. 662.)

4. Said deed and complaint constituted a color of title in

Dumartheray, and were evidence to show that Dumartheray entered and claimed as owner and therefore good against a mere prior possessor. (*Livingston v. Peru Iron Co.*, 9 Wend.

511; 8 Cow. 589; 13 John. 120; 9 Id. 180; 2 Caines, [296] 183; 5 Serg. & R. 354; 2 \*Mason, 536; *Gregory v. Haynes*, 13 Cal. 595; *Hubbard v. Sullivan*, 18 Id. 508.)

III. The Court erred in refusing to allow the defendants to prove the payment of taxes as evidence of ownership, or of abandonment by Mondolet, also the value of the improvements. (*Ford v. Holton*, 5 Cal. 21; *Welch v. Sullivan*, 8 Id. 202, 511.)

IV. The Court erred in refusing to allow the tax deed by Patch, Tax Collector, to be read in evidence, on account of the insufficiency in the description of the premises recited in the deed. (1 Selden, N. Y. 236; *Dana v. Fiedler*, 2 Kern. 40; *Sharp v. Spier*, 4 Hill, 76; *Talman v. White*, 2 Coms. 66; 13 How. 18; *Kelsey v. Abbott*, 13 Cal. 609; *Lackman v. Clark*, 14 Id. 131; *Patch v. Moore*, 12 Id. 265.) The defendants had the right to show by parol the meaning of the figures "12x100" in the description in the tax deed. (Story on Cont. 677; 10 Texas, 546; 13 B. Monroe, Ky. 477; 16 Missouri, 210; 13 Ill. 708; 2 Kern. 40; 4 E. D. Smith, N. Y. 215.)

V. The Court erred in charging the jury that the question of abandonment was a question of intention in this case, and exclusively a question of fact, and that the Van Ness Ordinance had no operation in favor of the defendants to the action. (*Davis v. Butler*, 6 Cal. 510; 1 Watts, 46; 5 Id. 13, 173, 284, 359; 1 Serg. 120; *Whitney v. Wright*, 15 Wend. 171; 10 Cal. 331; *Wolf v. Baldwin*, 19 Id. 306.)

VI. The Court erred in refusing a new trial for the insufficiency of the evidence to justify the verdict.

*H. S. Love*, for Respondent.

I. It was clearly proper for the Court not only to allow the plaintiff to prove that Mondolet was in possession, but that he entered under color of title, and while so being in possession he claimed under color of title.

II. There was no error in refusing to allow the tax deed from Buckingham to Dumartheray to be read in evidence. The statute of 1857 has no application to the Buckingham

deed given in 1851. (*Beekman v. Bingham*, 1 Seld. 366; *Stryker v. Kelley*, 2 Denio, 323; *Varick v. Tallman*, 2 Barb. 113.) As no title passed by \*the deed, no pre- [297] sumptions will be indulged in by reason of the deed "being ten years old." The complaint in the case of *Mon-dolet v. Dufan* was inadmissible for any purpose, and was clearly inadmissible as constituting an admission of title in the defendant Dumartheray.

III. There was no error in the Court refusing to allow the defendants to prove the payment of taxes by Dumartheray for a portion of the time in which he had been in possession. Dumartheray could acquire no title by so doing. In equity he was bound to pay them, and the payments are to be regarded as advancements for the benefit of the owner. (*Kelley v. Abbott*, 13 Cal. 619.)

IV. The Court properly refused to allow the defendants to prove the value of their improvements by way of "set-off," no improvements having been pleaded.

V. There was no error in the Court refusing to allow the tax deed from Patch, Collector, to be read in evidence. (*Sharp v. Spier*, 4 Hill, 76, 90, 91; *Sharp v. Johnson*, Id. 102, 103; 2 Comst. 170-172; 2 Barb. 344; 4 Denio, 237; Blackwell, 151-154, 330; Id. 450, sec. 16; 4 Hill, 76-91, *et seq.*; 8 Cal. 344; *Tallman v. White*, 2 Comst. 66; *Lessee of Perkins v. Dibble*, 10 Ohio, 433; *Burchard v. Hubbard et al.*, 11 Id. 316.)

VI. The recitals of the deed from Patch, Tax Collector, were insufficient for any purpose. (1 McLean, 321; Gould's Pl. 189, sec. 29, 3d ed.; 1 Comst. 79; 13 Cal. 609; *Loher v. Latham*, 15 Id. 418-420.)

VII. The tax deed from Patch, the Collector, was not *prima facie* evidence of the facts therein contained. (*Ferris c. Coover*, 10 Cal. 589, 632, 633; *Kelsey v. Abbott*, 13 Id. 609, 619; *Lackman v. Clark*, 14 Id. 131; 2 Comst. 66; 2 Denio, 323; 1 Seld. 366; 2 Barb. 113.)

VIII. There was no error in the Court refusing to allow the defendants to show by parol testimony the meaning of the figures 12x100. (Blackwell, 152-154 note.)

IX. The Court committed no error in submitting the question of abandonment to the jury, and in charging the jury that the Van Ness Ordinance had nothing to do with

this case. (10 Cal. 589; Act of Assembly of Penn., [298] passed Dec. 30th, 1786; 1 Watts, \*46-49, 52; 1 Serg. & R. 120; 5 Serg. & Watts, 284-301; 4 Yeates, 534; *Whitney v. Wright*, 15 Wend. 171; 8 Cal. 144, affirmed in Id. 223; 9 Id. 5; 10 Id. 183, and cases there cited by respondent's counsel; Laws of 1858, 54, sec. 9.)

X. Dumartheray could acquire no title under the tax deed from Patch to Bartlett, his grantor. (Blackwell, 460-471; 10 Cal. 609; 22 Maine, 371; 12 Ill. 442.)

XI. The tax deed from Buckingham to Dumartheray being nine years old, is not to be regarded as an ancient deed, and nothing will be presumed in relation to it. (6 Wheat. 119; Blackwell, 48, 88, 89, 604; *Allen v. Smith*, 1 Leigh, 231; 4 Hill, 86; 4 Wheat. 77, *et seq.*; *Thatcher v. Powell*, 6 Id. 119; Blackwell, 619; *Ex parte Newman*, 9 Cal. 526.)

FIELD, C. J. delivered the opinion of the Court—COPE, J. and NORTON, J. concurring.

This is an action for the possession of certain real estate situated within the city of San Francisco. The plaintiff bases his right to recover upon title as evidenced by the possession in 1850 and 1851 of one Mondolet, through whom he claims. The defendants rely upon two tax deeds, one executed by the Treasurer of the county of San Francisco in March, 1851, and the other executed by the Tax Collector of the City and County of San Francisco in June, 1858, and upon an alleged abandonment of the premises by Mondolet, and the operation of the Van Ness Ordinance. On the trial the plaintiff produced and gave in evidence, against the objection of the defendants, a conveyance of the premises from one Ramirez to Mondolet, executed in April, 1851, and then proved that Mondolet was in the possession of the premises in 1850 and occupied them until June, 1851; that during this period there was a two-story building thereon, which Mondolet used as a restaurant until it was destroyed by fire; and that the defendants were in the possession at the commencement of the action. The plaintiff also gave proof of the value of the use and occupation.

The tax deeds offered by the defendants, and the evidence in connection with them, were excluded upon the objection

of the plaintiff. Proof of the payment of taxes, as evidence of ownership by the \*defendants and of [299] abandonment by Mondolet, was rejected; and the alleged abandonment was submitted upon other proof as a question of fact to the jury. The Court refused to admit evidence of the value of the improvements as a set-off to the damages claimed, and held that the Van Ness Ordinance had no operation in favor of the defendants. The jury found for the plaintiff and assessed his damages at three hundred dollars, and judgment was entered upon the verdict.

Various errors are assigned for a reversal of the judgment. These arise upon the ruling of the Court below in admitting the conveyance from Ramirez to Mondolet; in excluding the tax deeds and evidence offered in connection with them; in rejecting proof of the payment of taxes and the value of the improvements; and upon the instructions to the jury on the question of abandonment and the operation of the Van Ness Ordinance; and upon the refusal of a new trial for the alleged insufficiency of the evidence to justify the verdict.

1. The conveyance from Ramirez to Mondolet was admissible, as showing the extent and boundaries of the premises of which Mondolet claimed possession. If Ramirez had no title, of course no title passed by his conveyance, and the defendants were not prejudiced by its introduction in evidence.

2. The tax deed of the County Treasurer, executed in March, 1851, was inadmissible without preliminary proof that all the requirements of the law authorizing its execution had been complied with. The statute which makes a tax deed *prima facie* evidence of the transfer of the title of the delinquent had not then been passed. That statute only applies to deeds executed upon a sale for taxes subsequently levied. Nor was any presumption to be indulged that the Treasurer, and the officers whose acts preceded his, had complied with the law. It was not a case in which presumptions could be indulged that the officers had done their duty. They acted under a naked statutory power, with a view to divest, upon certain contingencies, the title of the citizen, and in all such cases the purchaser relying upon the execution of the power must show that every preliminary step prescribed by the law

has been followed. (*Williams v. Peyton's Lessee*, 4 [300] Wheat. 78; *Varick v. \*Tallman*, 3 Barb. 113.) Nor was any presumption to be indulged that *all* the preliminary steps had been followed from the length of time the deed had been executed and the grantee had been in the possession of the premises. There are many transactions of which it is impossible or extremely difficult, after the lapse of little time, to produce the proper evidence, and in favor of the regularity of which presumptions are in consequence made by the law. "Thus," says Greenleaf, "where an authority is given by law to executors, administrators, guardians, or other officers, to make sales of lands upon being duly licensed by the Courts, and they are required to advertise the sales in a particular manner, and to observe other formalities in their proceedings, the lapse of sufficient time (which in most cases is fixed at thirty years) raises a conclusive presumption that all the legal formalities of the sale were observed. The license to sell, as well as the official character of the party, being provable by record or judicial registration, must in general be so proved, and the deed is also to be proved in the usual manner; it is only the intermediate proceedings that are presumed. *Probatis extremis præsumentur media*. The reason of this rule is found in the great probability that the necessary intermediate proceedings were all regularly had, resulting from the lapse of so long a period of time, and the acquiescence of the parties adversely interested, and in the great uncertainty of titles, as well as the other public mischiefs, which would result if strict proof were required of facts so transitory in their nature, and the evidence of which is so seldom preserved with care. Hence, it does not extend to records and public documents, which are supposed always to remain in the custody of the officers charged with their preservation, and which, therefore, must be proved, or their loss accounted for and supplied by secondary evidence." (Evidence, vol. 1, sec. 20.) If, in accordance with the reasons thus stated by Greenleaf, presumptions could be indulged in support of *any* of the preliminary acts essential to the exercise of the power of sale by the County Treasurer in the present case, they could only be indulged in favor of the acts between the assessment and the execution of the tax

deed; none could be indulged in favor of the assessment itself, which was the foundation of all subsequent proceedings. The assessment consist-<sup>\*</sup>ing in the [301] listing and valuation of the property for the purpose of taxation, was also matter of record kept by the Assessor, and delivered by him to the Auditor of the county. From it, after it had been corrected by the Board of Equalization of the county, the duplicate was prepared upon which the Treasurer proceeded to demand the tax and sell the property. This record of the assessment was not produced, nor was any evidence offered of the assessment, or of any of the acts made by the statute essential prerequisites to the sale. The validity of the deed of the Treasurer was rested upon presumptions in favor of the acts of public officers, and the lapse of time since it was executed and the grantee has been in possession of the premises.

In connection with this tax deed, the defendants offered the complaint of Mondolet in an action brought by him against one Dufan, as constituting an admission of title in the defendant Dumartheray. It was rejected as evidence for the purpose stated, but was subsequently admitted as evidence of abandonment. The action was brought to recover damages from Dufan, who was Mondolet's agent, for having allowed the premises to be sold for taxes. In the complaint the plaintiff alleges, that in consequence of the neglect of his agent the premises were sold and redemption was not made, and that the sale thereby became absolute, and that he had in consequence sustained damages to the amount of \$1,500. These statements do not amount to an admission of title in the purchaser at the tax sale, and even if they did, the admission would not operate to transfer such title. They only show that Mondolet believed that he had suffered to a certain amount from the negligence of his agent.

The tax deed from the Collector of the City and County of San Francisco, executed in June, 1858, was properly excluded for uncertainty in the description by which the property was assessed and sold, as set forth in the deed itself. The description is as follows: "A lot on Dupont Street, one hundred and thirty-seven feet and six inches from the north-west corner of Washington Street, with the improvements thereon—

12 x 100." This description does not state where Dupont or Washington Streets are situated—whether in or out of the city of San Francisco. But assuming that streets by these [302] names exist in the city of San Francisco, it does \*not appear in which direction from the north-west corner of Washington Street the lot assessed is distant one hundred and thirty-seven feet and six inches. Nor does the description give the dimensions or form of the lot, or show in what direction its lines run, after the distance from Washington Street is reached. The figures "12 x 100" in the deed are as unintelligible as so many hieroglyphics, whatever technical meaning may be attached to them by the custom of auctioneers, assessors, and property holders in the city of San Francisco. In advertising the property for sale the Collector follows the description in its assessment, and the Assessor is expected to give and should give the description in ordinary language, and not by signs in use by a particular class in a particular locality. The figures may apply to different standards of measurement—to inches, feet, or varas—and by all these standards the dimensions of property are given in conveyances in San Francisco. It is not sufficient that a similar description, in a contract or conveyance between individuals, might be shown by parol evidence to have been intended for particular premises. The description must be certain of itself, and not such as to require evidence *aliunde* to render it certain. The statute requires the Collector in his publication of the delinquent list to give "such a condensed description of the property that it *may be easily known*." (Revenue Act of 1857, sec. 15.) A description which cannot be made intelligible without resort to extrinsic evidence is not one of this character. Certainty in the description is required to apprise the owner that his property is advertised for sale, and to enable him to prevent the sale by the payment of the taxes thereon, and to impart information to bidders of the actual extent and location of the premises to be sold. All subsequent proceedings depend upon this certainty. An inaccurate or an uncertain description defeats every step subsequently taken, and, as we have already said, the uncertainty cannot be cured by evidence *aliunde*. "A description," says Blackwell, "sufficiently clear to convey land between man and man,



and which, if contained in an agreement to convey, would authorize a Court of Equity to decree a specific execution, will not answer in the proceedings to enforce the collection of a tax. In the case of private transactions, the Courts in construing the documents endeavor to [303] collect the intention of the parties, and give that intention effect. If a latent ambiguity exists in the description, parol evidence is resorted to for the purpose of explaining it and giving to the intention of the parties complete operation; and when the estate intended to be conveyed is sufficiently described in the deed or other writing the addition of a circumstance, false or mistaken, will be rejected as surplusage, in order to carry the intention into effect. But in these tax proceedings the owner of the estate has nothing to do—he intends nothing; the Government is acting through its agents in hostility to him and with a view of enforcing the collection of a tax from him.” (Treatise on Tax Titles, 152; *Tallman v. White*, 2 Coms. 70; *Dike v. Lewis*, 4 Denio, 238.)

3. The proof as to the payment of taxes was properly excluded. Title to another man’s property cannot be acquired by the payment of the taxes thereon. And the payment of the taxes by the occupant in the present case for a portion of the time he was in possession was not of itself, disconnected from other circumstances, evidence that the owner had abandoned the property.

The value of the improvements could not be set off against the damages claimed, as no foundation was laid in the allegations of the answer for any proof on the subject.

4. The charge to the jury on the subject of abandonment was correct. The charge was, that the question of abandonment was one of intention, of which the jury was to judge exclusively, and that in order to do so they must take into consideration all the facts and circumstances before them. The question was correctly stated; it was plainly one of intention to be gathered from the facts. There was little evidence on the subject—none from which the Court would have been warranted in taking it from the jury. There are cases, undoubtedly, in which an abandonment may be inferred from the lapse of time and the delay of the first occupant in asserting his claim to the possession against parties subsequently

entering upon the premises. But in such cases the leaving of the premises must have been voluntary, and without any expressed intention to resume the possession. In the case at bar it appears that when Mondolet ceased to occupy in person the premises, he left an agent in charge of them.

[304] This circumstance is of itself \*sufficient to rebut the presumption of abandonment arising from the fact that he ceased to occupy them, and to render the question, whether in fact he did or did not abandon them, one for the consideration of the jury.

There was no error in the charge of the Court that the Van Ness Ordinance had no operation in favor of the defendants. By that ordinance the city relinquished and granted all her title and claim to her lands, with certain exceptions, to the parties in the actual possession thereof, by themselves or tenants, on or before the first of January, 1855, provided such possession was continued up to the introduction of the ordinance in the Common Council; or if interrupted by an intruder or trespasser, had been or might be recovered by legal process. The defendant Dumartheray was in the actual possession of the premises in controversy at those periods, but it was a possession acquired by intrusion upon the prior rights of Mondolet. In determining the question whether or not there had been such intrusion, Dumartheray, and those claiming under him, could not invoke the protection of the ordinance.

5. Some doubt is thrown upon the evidence of the witness for the plaintiff, from the contradiction between his testimony and statements in the complaint filed by Mondolet against Dufan. Still the plaintiff's case would not be materially changed if we suppose the personal occupation of the premises by Mondolet ceased in September, 1850, and that the subsequent occupation until the fire in June, 1851, was by his agent. The question of the prior possession of Mondolet was distinctly left to the jury, and there is not sufficient in the doubts created as to the statements of the witness to justify any interference with their action. A verdict is not to be disturbed where the evidence is merely conflicting. The jury having the witnesses before them are the most competent judges of the weight to be attached to their testimony; and

it is not sufficient that an appellate Court, looking at the testimony as it is written down, would have come to a different conclusion.

Judgment affirmed.

The appellants applied for a rehearing, on the grounds:

1st. That the Court had not in its opinion passed upon the ques-\*tion whether the tax deed, under [305] which Dumartheray entered and which was found invalid, was or was not sufficient to constitute a color of title, and therefore a good defense to prior possession.

2d. That as against the defendant Cannovan the judgment should be modified, so that no damages for the value of the use and occupation should be recoverable against him, as it appeared from the record that he was a tenant of Dumartheray and paid rent to him.

FIELD, C. J. delivered the opinion of the Court on the petition—COPE, J. concurring.

The possession of Mondolet was evidence of seizin in fee in him, and no further or higher evidence of title was required to enable the plaintiff, claiming through him, to recover, until the defendant had shown an anterior possession or had traced title from a paramount source. (*Day v. Alverson*, 9 Wend. 223; *Hill v. Draper*, 10 Barb. 458.) It is immaterial in this view whether we consider the tax deed to Dumartheray sufficient to constitute color of title or otherwise.

The fact that Cannovan was a mere tenant of Dumartheray, and had paid rent for the premises, does not release him from liability to the plaintiff. The action of ejectment lies only against the occupant of the premises, and to him the plaintiff must look for compensation for their use. If Cannovan has already paid the rent, he can have recourse upon his landlord for any further sum he may be compelled to pay by the present action.

Rehearing denied.

## REESE v. MAHONEY.\*

<sup>1</sup> **VERBAL STIPULATIONS DISREGARDED.**—Verbal stipulations with reference to proceedings in pending actions cannot be regarded except so far as they are admitted by the parties against whom they are sought to be enforced.

**OPENING DEFAULT—DILIGENCE REQUIRED.**—A defendant who, having suffered a default, has obtained from the plaintiff a stipulation that the default may be set aside, must use reasonable diligence in applying to the Court for the relief contemplated, or his right to it will be lost. An unexplained delay of seven years in making the application will justify the Court in refusing to enforce the stipulation.

[806] <sup>2</sup> **IDEM—SHOWING REQUIRED.**—\*An application to open a default must be accompanied by some showing of merits. In the absence of such showing it will be denied.

## APPEAL from the Twelfth Judicial District.

This was an action of ejectment to recover certain lots in San Francisco brought against the appellants, David and Dennis Mahoney, and ten others. The complaint was filed Oct. 31st, 1854, and summons was served on all the defendants early in November following. Only two of the defendants answered; the others, including appellants, making default, the entry of which was made, on motion of plaintiffs, November 27th, 1854.

Two trials were subsequently had upon the issues raised in the answers of the defendants who had appeared, in each of which the jury disagreed, and the cause was on the calendar for trial again in September, 1861, at which time the appellants appeared and moved to open the default entered against them, and for leave to answer. The motion was supported by a statement of facts made by the counsel of the appellants, and admitted to have the force of an affidavit, and was resisted by a counter statement, admitted to have like effect, made by the counsel for plaintiff.

The material facts in these statements sufficiently appear in the opinion of the Court. That on the part of defendants contained nothing showing that they had any defense to the action on the merits. The motion was denied, and a judg-

\*Commented on in *Satterlee v. Bliss*, 86 Cal. 518.

<sup>1</sup> See *Himmelmann v. Sullivan*, 40 Cal. 125; *Bookheim v. North British Ins. Co.*, 88 Cal. 623.

<sup>2</sup> See *Lewis v. Rigney*, ante 268, and note.

ment subsequently entered against the defendants, including the appellants, for the recovery of the premises without damages. From this judgment, and from the order denying the opening of the default, the appeal is taken.

*Sol. A. Sharp, for Appellants.*

The default having been taken at the plaintiff's instance, and in violation of his agreement with the defendant, Dennis Mahoney, and the plaintiff having the authority to open this default, cannot complain that the defendant was guilty of laches in not applying to the Court on his return to the State. The violation of the agreement by the plaintiff was a wrong of which he could take no advantage.

Until he had this default set aside, and thereby restored the \*defendant to his rights under the agree- [307] ment, the defendant was not obliged to take any action in the matter. He was not obliged to enforce through the Court what the plaintiff had agreed and had the power to do.

*Hall McAllister, for Respondent.*

I. As the alleged agreements with the Mahoneys were all verbal, they can only be regarded and enforced to the extent that they are admitted by the plaintiff, and especially should this be so in reference to a verbal promise alleged to have been made in November, 1854, never in any way recognized by the party against whom it is now invoked, and set up for the first time in September, 1861—nearly seven years after it is alleged to have been made. (*Patterson v. Ely*, 19 Cal. 35.)

II. A fatal defect in the applications of both the Mahoneys to vacate their defaults, is the absence of any averment of merits.

There is no allegation, or even suggestion, anywhere that the Mahoneys, or either of them, have a defense to the action, or a title to the premises in dispute, or that the plaintiff's title is imperfect, or that any injustice will be done by maintaining the defaults.

An affidavit of merits is absolutely essential in an application to vacate a default. Upon this point the authorities are unanimous. (*Patterson v. Ely*, above cited; *Chase v. Swain*,

9 Cal. 130; *Harlan v. Smith*, 6 Id. 174; *Allen v. Thompson*, 1 Hall, 54.)

III. The granting or refusing a motion to set aside a default, and for leave to answer, rests in the sound discretion of the Court, and its rulings will not be revised, except for the most cogent reasons, nor unless it affirmatively appear that injustice has been done. (*Musgrove v. Perkins*, 9 Cal. 211; *Turner v. Morrison*, 11 Id. 21; *Pilot Rock Creek Canal Co. v. Chapmau*, Id. 161; *Broadus v. Nelson*, 16 Id. 79.)

FIELD, C. J. delivered the opinion of the Court—COPE, J. and NORTON, J. concurring.

The motion to open the default entered against the defendants, David and Dennis Mahoney, and to allow them to answer to the complaint, was properly denied. Their [308] default was entered in \*November, 1854, and the motion was made in September, 1861—nearly seven years afterwards. The delay in the motion is attempted to be explained by the existence of an alleged verbal stipulation of the plaintiff, that the default should be set aside, and the pendency of negotiations for a settlement until within a few days previous. It is also alleged in support of the motion, on the part of defendant, Dennis Mahoney, that the process in the case was served upon him in 1854, on board of a steamer, as he was about leaving for the Eastern States, and that the plaintiff, who was present at the time, stated to him that he might answer upon his return, and that no default should be taken against him. He returned in about a year afterwards.

It appears, from the statement made on the part of the plaintiff, that the stipulation, so far as the default of David Mahoney is concerned, was made in 1855, upon the understanding that the suit was to be settled pursuant to a verbal agreement of compromise, which, for years afterwards, the defendant promised to carry out, but finally refused to perfect.

Verbal stipulations with reference to proceedings in pending actions cannot be regarded, except so far as they are admitted by the parties against whom they are sought to be enforced. This rule is necessary to avoid endless disputes.

(*Patterson v. Ely*, 19 Cal. 35.) But if the rule were otherwise, the stipulations would not have aided the motion. The one given to Dennis Mahoney in November, 1854, if not adhered to, should have been made the ground of an application to the Court within a reasonable time after his return from the Eastern States in 1855. The Court very properly refused to listen to complaints that this stipulation had been violated nearly seven years before. And it was too late for David Mahoney, after neglecting to act upon the stipulation given to him until 1861, to ask that it then be enforced.

The motion was also properly denied on another ground. There was no allegation of merits on the part of either of the Mahoneys. It nowhere appears that they have any title to the property or defense to the action, or that the judgment entered against them is in any respect unjust.

Judgment affirmed.

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\*WHEELOCK v. WARSCHAUER.

[309]

<sup>1</sup> **EVICION AS A DEFENSE IN FORCIBLE DETAINER.**—In an action by a landlord against his tenant under the thirteenth section of the Forcible Entry and Detainer Act, the latter may defend by showing an eviction under an adverse title in a judicial proceeding of which proper notice was given to the landlord.

**EFFECT OF EVICTION.**—Such a defense does not involve any question of title, the effect of an eviction being to dispossess the landlord as well as the tenant, and to relieve the latter from the obligations of his tenancy.

**EVICION A TERMINATION OF TENANCY.**—The rule which estops a tenant from disputing his landlord's title does not prevent him from showing that the tenancy has been determined, and he may treat an eviction, with notice, by one having an adverse title, as a termination of the tenancy, and thus resist any claim by the landlord either for rent or possession.

**NOTICE OF EVICTION.**—The notice by a tenant to his landlord of proceedings to evict him may be oral.

APPEAL from County Court of San Francisco.

This action was commenced June 10th, 1861, in a Justice's

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<sup>1</sup> Cited as authority in *Steinback v. Krone*, 36 Cal. 310; *Valentine v. Mahoney*, 37 Cal. 395; and see *Dutton v. Warschauer*, post, 609; *Wheeslock v. Warschauer*, 34 Cal. 265; *Douglas v. Fulda*, 45 Cal. 594. See 2 Colo. 140.

Court in San Francisco, under the thirteenth section of the Forcible Entry and Detainer Act. The complaint alleges that on the first day of October, 1858, the plaintiff, Joanna Wheelock, leased from month to month to the defendant, William Warschauer, a lot in San Francisco; that defendant took possession, and still continues to occupy; that on the twenty-ninth of April, 1861, plaintiff served upon defendant a notice to quit on the first day of June following; that on the third day of June, and more than three days before the commencement of the action, plaintiff made written demand upon defendant that he should deliver and surrender the premises, but that defendant refused to comply with the demand, and still retains possession to the damage of plaintiff in the sum of \$150, for which sum with restitution judgment is prayed.

The answer admits, in substance, the allegations as to the lease and the possession of defendant, and avers that in 1859 one David Dutton sued defendant in an action of ejectment in the Fourth District Court to recover the demised premises; that the defendant answered in said action, setting up the title of the present plaintiff and the lease from him; that the action was tried, and resulted in a judgment in favor of Dutton; that defendant moved for a new trial, which was denied, and took an appeal to the Supreme Court, which was subsequently dismissed; that upon this judgment a writ of res-  
[310] \*titution was issued, by virtue of which defendant was removed from the premises, and Dutton placed in possession; that thereafter defendant took from Dutton a lease of the lot, under which he is now in possession.

In the Justice's Court plaintiff had judgment, and defendant appealed to the County Court, where the case was tried *de novo* by the Court, a jury being waived.

Before the trial the parties made the following stipulation. "It is hereby stipulated and agreed upon the part of the defendant in the said action, that the facts charged in the complaint are true. Upon the part of the plaintiff it is stipulated and agreed that all that portion of the answer which relates to the suit of *Dutton v. Warschauer*, and the proceedings had therein, is true; and it is further stipulated and agreed that the plaintiff, Joanna Wheelock, had oral notice of the exist-



ence of the said action of *Dutton v. Warschauer*, and that the answer of said defendants may be amended so as to plead the said notice."

When the cause was called for trial, defendant moved for leave to amend his answer so as to allege that the plaintiff acted upon the notice mentioned in the stipulation, by employing counsel and conducting the defense in the action by Dutton against defendant, which motion the Court denied, and defendant excepted. Defendant then offered to prove by evidence that plaintiff had acted upon the notice by employing counsel and conducting the defense, and the Court refused to permit the evidence to be introduced, and defendant excepted. No evidence was introduced by either party, and on the pleadings and stipulation the Court gave judgment for the plaintiff. Defendant moved for a new trial, which was denied, and from this order and the judgment he appeals

*Patterson & Stow and J. D. Bristol*, for Appellant.

I. The Court erred in refusing to allow defendant to amend his answer so as to show what plaintiff, upon receiving notice of the suit of *Dutton v. Warschauer*, did in reference to defending the same. (Forcible Entry and Detainer Act, sec. 20.)

II. The Court erred in refusing to allow defendant (appellant) to introduce testimony going to show that plaintiff (respondent) acted upon the notice she had of [311] the suit of *Dutton v. Warschauer* by employing counsel and conducting the defense of the same. The twentieth section of the Forcible Entry and Detainer Act says that "all matters in excuse, justification, or avoidance of the allegations in the complaint, may be given in evidence under the answer," and whether the answer was amended or not, the defendant was entitled to give evidence in "excuse" or "justification" of his refusal to deliver the possession of the premises demanded.

III. The plaintiff was disseized by the proceedings in the ejectment suit, and cannot, therefore, maintain this action. In *Mitchell v. Davis*, 20 Cal. 45, this Court recognized that the possession given by a Sheriff under a writ of restitution was such possession as would maintain forcible entry, etc.;

if so, it is such as will shield the possessor from the charge of unlawfully detaining. (See also *Kercheval v. Ambler*, 4 Dana, Ky. 167.)

The possession which Dutton acquired by virtue of the writ of restitution was, if Dutton himself had continued in possession, sufficient to maintain trespass against Mrs. Wheelock if she had entered upon it. (*Speed v. Ripperdan*, 1 Little, Ky. 189, 190.) It would follow if she forcibly entered and detained, the action of forcible entry and detainer could be maintained by Dutton. (*Higginbotham v. H.*, 10 B. Monroe, 369.) Defendant having been put out of possession by Dutton's writ, and then having leased of Dutton, had the same rights as Dutton. "Two persons cannot be in possession of the same land at the same time," etc. (3 Brevard, 413.) Now if Dutton was put in possession under the writ of restitution, of course the defendant in that writ was not in possession, nor the plaintiff in this action.

IV. That defendant could set up the eviction by Dutton and his writ of restitution is well settled, and that such eviction would be a bar to a claim of Wheelock for rent, and if so we cannot see why not a bar to the proceeding for unlawful detainer. (*Smith v. Sheppard*, 15 Pick. 147, 150; *Morse v. Goddard*, 13 Met. 179; *Pendleton v. Dryett*, 4 Cowen, 581. In *George v. Putney*, 4 Chush. 354, the Court said: "If the lessee is disturbed in his occupation by a party having title paramount to that of his lessor, so that he cannot legally continue

[312] his occupation under the lessor with-<sup>\*</sup>out rendering himself liable as a trespasser to the other party, he may yield the possession and take a new lease under him.

\* \* \* He will not thereafter be liable to pay rent to the original lessor." (See also *Watson v. Lane*, 11 Exchequer; *Ogle v. Atkinson*, 5 Taunton, 759, 1 Eng. Com. Law, 391.) Nor was it necessary for defendant to surrender possession to plaintiff when Dutton's writ of restitution was executed before he could lease from Dutton, and defend this action under Dutton's judgment and lease. (*Chambers et al. v. Pleak*, 6 Dana, 429; 3 J. J. Marshall, 429; 5 Id. 105; Littel's Select Cases, 423; cited with approval, 4 Cushing, 355.)

"When land is sold at an execution sale, the tenant of the execution debtor may attorn to the purchaser, and he may

resist the suit of such debtor on a writ of forcible detainer by proof of the sale and attornment." (*Bowser v. Bowser*, 8 Humph. Tenn. 23; 1 Washburn on Real Property, 359; *Lunford v. Turner*, 5 J. J. Marshall, above cited; *Foster v. Morris*, 3 A. K. Marshall, 1375.)

The stipulation fixes the fact that plaintiff had notice of Dutton's suit, and we offered to show that she employed counsel and defended it in the name of her tenant (defendant) by setting up her title. Such facts would bind plaintiff the same as if the action was against her by name. (Adams on Ejectment, 261; 2 Phil. Ev. C. & H. Notes, 4th Am. ed. 10; *Kimerly v. Orpe*, 2 Douglas, 517; *Rogers v. Haines*, 3 Greenl. 362; *Calhoun v. Durning*, 4 Dal. 120.)

*Henry E. Heighton*, for Respondent.

I. The refusal by the Court, at the hearing, to allow Warschauer so to amend his answer as to plead that Mrs. Wheelock acted upon the oral notice she received of the existence of the suit of *Dutton v. Warschauer*, by employing counsel and conducting the defense to the action, was right.

1. Section twenty of the statute authorizes amendments "in matters of form only." The amendment proposed was one of substance. 2. The right to amend had been lost by the stipulation as to the facts, the waiver of the right of jury trial, and the submission of the cause to the Court upon the agreed statement. 3. The granting or refusal of the amendment was within the sound discretion of the Court, which, under the circumstances, was properly exercised.

\*II. The Court did not err in refusing to permit [313] testimony to be introduced to support the allegation proposed to be made in the amendment, which had been previously refused. It is true that the statute (sec. 20) provides that "all matters in excuse, justification, or avoidance, may be given in evidence under the answer;" that is, when specially pleaded in the answer. That part of the section is merely declaratory of the ordinary rule of evidence, and a different construction would render the first part wholly inoperative. The matter proposed to be given in evidence was neither in excuse, justification, or avoidance, of the allegations in the

complaint. The argument under this head will be stated hereafter.

III. The special plea set up by Warschauer, and admitted by the stipulation, is not in law sufficient to defeat our recovery.

The general rule of law applicable to the relationship of landlord and tenant, in the aspect presented by this case, is well expressed in the following extract from the opinion of Mr. Justice Baldwin in the case of *Willison v. Watkins*, 3 Pet. 47, 48: "It is an undoubted principle of law, fully recognized by this Court, that a tenant cannot dispute the title of his landlord, either by setting up a title in himself or a third person, during the existence of the lease or tenancy. The principle of estoppel applies to the relation between them, and operates in its full force to prevent the tenant from violating that contract by which he obtained and holds possession. He cannot change the character of the tenure by his own act merely, so as to enable himself to hold against his landlord, who reposes under the security of the tenancy, believing the possession of the tenant to be his own, held under his title, and ready to be surrendered by its termination by the lapse of time, or demand of possession. \* \* \* On all these subjects the law is too well settled to require illustration, or reasoning, or to admit of a doubt."

*Hovenden v. Lord Annesley*, 2 Scho. & Lef. 607, case of a tenant who attorned to an adverse claimant, Lord Redesdale said: "The attornment will not affect the title of the lessor so long as he has a right to consider the person holding possession as his tenant." *Porter v. Mayfield*, 21 Penn. 263, 264: "The principle is, that when the relation of landlord and tenant appears, that relation must be dissolved and [314] the possession restored before the tenant can set up another title." In *Camp v. Camp*, 5 Conn. 301, the person "once a tenant, so long as he remains in the occupation of the land demised, must be deemed to continue in that character, unless he has surrendered the possession to his landlord," etc. In this action, the tenant certainly cannot put his landlord's title on trial.

*Ryerss, Baxter et als. v. Wheeler*, 25 Wend. 436, leaving out of consideration, for the present, the oral notice Mrs. Whee-

lock received and the form of the action, is precisely similar to this case. The tenants were sued in ejectment by one Bogert, and dispossessed by the Sheriff of Yates County by virtue of a writ of *habere facias possessionem*. They then attorned to Bogert, and set up these proceedings as a defense to an action of ejectment by their landlord. Chief Justice Nelson, in delivering the opinion of the Court said: "For aught that appears, Baxter (the landlord) had no knowledge of the suits against his tenants, (the Wheelers,) nor any opportunity to defend. Under such circumstances, I cannot say the recovery is to have the effect of destroying the presumption of title arising from his prior possession. It is very easy to see that great injustice might be done if, by the default or collusion of his tenants, he should be driven to put himself on the legal title." (See also *Coburn et al. v. Palmer*, 8 Cush. 124; *Wall v. Goodenough*, 16 Ill. 415; *McCartney v. Hunt et al.*, Id. 76; *Dumas v. Hunter*, 25 Ala. 711.)

The above authorities show—1st. That the special defense set up by Warschauer could, under no circumstances, avail him in this form of action; although, if the proper notice had been given, or if the landlord had in fact defended the ejectment suit, it might perhaps have been used as the basis of a bill in equity brought to restrain the proceedings in this action. 2d. That it would not avail him in any form of action unless he could show that this landlord had, in fact, full and exclusive control of the suit in ejectment, or that a written notice was served upon the landlord immediately after the commencement of the action, apprising her of its character and offering her the opportunity to come in and defend.

IV. The oral notice to Mrs. Wheelock of the existence of the suit of *Dutton v. Warschauer* was insufficient. That any oral notice would have been insufficient is, I think, clearly established \*by the able dissenting opinion of [315] Mr. Justice Bronson in the case of *Miner v. Clark*, 15 Wend. 428, which was subsequently sustained by the Supreme Court of New York in *McEwen et als. v. The Montgomery County Mutual Insurance Co.*, 5 Hill, 101, and which has been adopted by the Supreme Court of this State in *Peabody v. Phelps*, 9 Cal. 226.) But even if the respondent might have been orally notified of the character of the suit of *Dutton v. Warschauer*,

and of the effect it was likely to have upon her rights and interests, so as to fix upon her the responsibility of defending the action, she was not so notified. In the language of Mr. Justice Field (*Peabody v. Phelps, supra*) she was not apprised "of what was required of her, and of the consequences which might follow if she neglected to defend the action." And it clearly appears by the record that she had, in fact, no opportunity to defend the action, because the appellant himself alleges that he exercised full control over it.

It is proper, also, to observe here that the cases above cited were not between landlord and tenant, and therefore not within the rule requiring the strictest good faith upon the part of the tenant. The reasoning they contain applies *a fortiori* to this case. (*Paul v. Witman*, 3 Watts & Serg. 409; *Collingwood v. Irwin*, 3 Watts, 310; *In re Cooper*, 15 John. 533; *Adams on Ejectment*, 255.)

If the respondent had been actually present in Court, and had cross-examined witnesses at the trial of *Dutton v. Warschauer*, her rights as against Warschauer would not have been affected. (4 Phil. Ev. 3.)

CORRE, J. delivered the opinion of the Court—FIELD, C. J. and NORTON, J. concurring.

This is an action under the thirteenth section of the Forcible Entry and Unlawful Detainer Act. The complaint alleges that the defendant is a tenant of the plaintiff, and that he unlawfully detains the demised premises, setting forth facts showing a wrongful holding over. The answer admits that a tenancy once existed between the parties, but alleges that it was terminated by the eviction of the defendant under a judgment in ejectment recovered against him by one Dutton.

It alleges also that the defendant pleaded his title [316] \*as a tenant in defense of the ejectment suit, and that

he now holds under a lease executed by Dutton subsequent to the eviction. There is no allegation that the plaintiff had notice of the pendency of the suit, but there is a stipulation authorizing an amendment in this respect, and admitting verbal notice of the fact. On the trial the defendant asked leave to amend by inserting an allegation that the plaintiff had acted upon this notice, and employed counsel

to defend the suit, but the Court refused to allow it. He then offered evidence to that effect, which was rejected, and the case being submitted to the Court, a judgment was rendered in favor of the plaintiff. The eviction was admitted, and if the matters alleged upon that subject, together with the fact of notice, are sufficient to constitute a defense, the judgment must be reversed.

The right to maintain the action depends upon the existence of a tenancy, and a tenancy once created is presumed to continue so long as the tenant remains in possession. This presumption may be rebutted, however, for the rule which estops a tenant from disputing the title of his landlord does not prevent him from showing that the tenancy has been determined. He is estopped so long as the tenancy continues, but the tenancy being dissolved, the disabilities resulting from his position as a tenant are removed, and the estoppel ceases. "The tenant," says Greenleaf, "may always show that his landlord's title has expired, or that he has sold his interest in the premises, or that it is alienated from him by judgment and operation of law." (2 Greenl. Ev. 253.) This doctrine is supported by a multitude of cases, and it seems that where the tenant is evicted by one having an adverse title, he may take from the latter a new lease, and set it up as against the landlord. (1 Washburn on Real Property, 359; *Foster v. Norris*, 3 A. K. Marsh. 609.) It is the duty of the landlord to protect him in his possession, and he may treat the eviction as terminating the tenancy, and resist any claim by the landlord, either for rent or for the possession. It is necessary, of course, that notice be given of the proceeding by which the tenant is evicted, so that the landlord may not be taken by surprise, and suffer an injury by reason of the carelessness or collusion of the tenant. There is no doubt that a defense of this character is admissible in the present case, for the statute expressly \*provides [317] that matters of excuse, justification, or avoidance, may be given in evidence. No question of title is involved, the question being simply as to the eviction, the effect of which was to dispossess the plaintiff as well as the defendant, relieving the latter from the obligations of the tenancy. So far as the notice is concerned, we regard the stipulation as suffi-

cient,\* for it admits that verbal notice was given, and the necessary inference is that the notice was full and complete. It is true the amendment authorized does not appear to have been made, but the object of the stipulation was to supply the defect, and we think the admission is to be considered as properly in the case. It is possible that the answer is not sufficiently explicit as to the title upon which the defendant was evicted, but under the circumstances we think an objection of this character ought not to be allowed. It appears that the tenancy was from month to month, and taking all the allegations together, they are sufficient to justify the conclusion that the title was adverse to that of the plaintiff. The fact is not directly alleged, but the case appears to have been determined without reference to technical defects, and solely upon the ground of the inadmissibility of the defense.

The judgment is reversed, and the cause remanded for a new trial.

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### BLAIR v. WALLACE.\*

**OBJECTIONS TO AWARD—WHAT MUST BE SHOWN.**—Where an award is objected to on the ground that it embraces matters not in fact submitted, though within the general terms of the submission, it lies with the objecting party to show affirmatively in what the arbitrators have exceeded their authority. Without such showing the award will be sustained.

**IDEM.**—Thus, where the agreement of submission recited a sale and resale of certain lands, out of which transaction disputes and misunderstandings had arisen, and the submission was of "all and every matter of dispute arising from or growing out of the transaction, aforesaid," an award that one party receive from the other a certain amount of money and convey to him the lands mentioned, is *prima facie* authorized by the submission.

**WHO MAY SUBMIT TO ARBITRATION.**—Wherever parties may by their own act transfer real property, or exercise any act of ownership with regard to it, they may refer any disputes concerning it to the decision of arbitrators, who may order [318] the same acts to be done which the parties themselves might do by agreement. This was the rule at common law and is not altered by section three hundred and eighty of the Practice Act.

### APPEAL from the Sixth Judicial District

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\*Commented on in *Spencer v. Winselman*, 42 Cal. 483.



On the seventeenth day of June, 1861, James Blair, Henry Blair, and B. F. Wallace, executed the following articles of arbitration:

“STATE OF CALIFORNIA, .  
City and County of Sacramento.

“District Court, Sixth Judicial District. *James Blair et al.*, plaintiffs, v. *B. F. Wallace*, defendant.

“Whereas, the defendant, on the sixteenth day of December, A. D. 1858, bought from said plaintiff, Henry Blair, real estate, situate, lying, and being in Sacramento County, and gave in payment therefor certain notes; and whereas, on the — day of July, A. D. 1859, the said defendant sold and conveyed to the plaintiff, James Blair, a part of the same lands; and whereas, on the last mentioned sale certain conditions were to be performed by the defendant and the said plaintiff, James Blair; and whereas, various and sundry misunderstandings and disagreements exist between the plaintiffs and the defendant concerning the said transactions; and whereas, the said James Blair and Henry Blair and the said B. F. Wallace are desirous of making a full and complete settlement of all matters whatsoever now at dispute between them, the said Henry Blair and James Blair, and the said B. F. Wallace, and particularly are desirous of determining and effecting a settlement of all matters connected with the said transactions, and at the same time are desirous of avoiding a suit at law in the Courts of this State: Now, therefore, it is stipulated and agreed by and between the parties hereunto, that all and every matter of dispute arising from or growing out of the transactions aforesaid be referred to John B. Burton and P. H. Russell for arbitration, adjudication, and determination, and that their award, when made, shall have like force and effect as a judgment of this Court; and for the purpose of obtaining an award, it is hereby stipulated and agreed that in case the said arbitrators shall disagree between themselves then and in that \*event they shall have [319] power to call in a third party, and a decision of a majority of such three shall stand and be entered as the award and decision of the arbitrators, and may be entered

and enforced by this Court with the like force and effect as a judgment of this Court entered herein. And it is further stipulated and agreed, that this submission be entered as an order of this Court. And it is hereby further stipulated and agreed by and between the parties hereto, that upon the hearing before the arbitrators each party may offer himself and shall be admitted as a witness on his own behalf."

On the fourteenth day of May, 1862, the arbitrators filed in Court their award, in which they determine: "That said James Blair shall first pay unto B. F. Wallace the full sum of nine hundred and sixty-five dollars; that upon the payment of said sum of nine hundred and sixty-five dollars by said Blair to said Wallace, the said Wallace shall make, execute, and deliver unto the said James Blair, his heirs and assigns, a good and sufficient deed of conveyance of and to all that certain tract of land situated in the County of Sacramento, State of California, originally conveyed by said Henry Blair to said Wallace on the —— day of December, 1858, [here follows a description of the land,] and said Wallace shall immediately, upon the execution and delivery of said deed, deliver unto said James Blair full and quiet possession of said lands and the appurtenances, and forever after refrain from doing any act or thing in and about the premises which shall disturb or tend to disturb said Blair's possession, or the possession of said Blair's heirs or assigns. And said Wallace shall further transfer and deliver unto said James Blair all the personal property which was situated on said land at the time of said aforementioned conveyance, or so much thereof as now remains thereon or in his possession."

On the filing of the award, it was ordered that it be entered as the judgment in the case. On the thirty-first of May, 1862, defendant, by his counsel, moved the Court to vacate the award on the ground that the arbitrators had exceeded their power in passing upon matters not submitted to them, and in passing upon a question of title to real property, [320] which motion was, on the seventeenth of \*October, 1862, denied by the Court. The evidence before the arbitrators was not brought before the District Court, nor is it contained in the transcript on appeal.

The appeal is taken by defendant from the judgment and the order denying the motion to vacate the award.

*Hereford & Williams*, for Appellant, cited chap. 4, sec. 380, of the Practice Act.

*Winans & Hyer*, for Respondent.

FIELD, C. J. delivered the opinion of the Court—NORTON, J. concurring.

It appears from the recitals of the submission entered into between the parties, that in December, 1858, the defendant purchased of *Henry Blair*, one of the plaintiffs, certain real estate situated in the county of Sacramento, and gave his promissory note for the purchase money; that in July, 1859, the defendant sold and conveyed a portion of the premises to *James Blair*, the other plaintiff; that upon the last sale certain conditions were to be performed; and that various and sundry misunderstandings and disagreements existed between the parties "concerning the said transactions." The submission was of "all and every matter of dispute arising from or growing out of the transactions aforesaid." The award of the arbitrators was, that *James Blair* pay to the defendant the sum of nine hundred and sixty-four dollars; and that the defendant execute to him a good and sufficient deed of the property purchased, in December, 1858, of *Henry Blair*, and deliver possession of the same, together with the personal property thereon, and forever afterwards refrain from disturbing the possession of the grantee. This award the defendant moved to vacate on the alleged ground that the arbitrators exceeded their authority in passing upon matters not submitted to them, and in passing upon a question of title to real property. The motion was denied, and in this respect, we think, the ruling of the Court was correct.

The matters awarded, so far as we can perceive, are embraced within the general terms of the submission. We cannot, it is true, affirm that a conveyance of [321] the property designated, or its possession, were within the contemplation of the parties. Yet they may have been the very matter in dispute, about which the whole disagreement between them arose. It lies with the parties objecting

to the award to show affirmatively that it embraces matters not in fact submitted, and this they have not done.

It does not appear that any question of title was involved in the matters determined. If the parties had agreed, as may have been the case, to execute a conveyance, the award only amounts to a decision that they carry the agreement into effect. "The law is well settled," says the Supreme Court of New York, "that where the parties might, by their own act, transfer real property, or exercise any act of ownership with respect to it, they may refer any disputes concerning it to the decision of arbitrators, who may order the same acts to be done which the parties themselves might do by agreement." (*Cox v. Jagger*, 2 Cowen, 649; see, also, *Kyd on Awards*, 61.) The statute of this State does not change the law in this respect.

Judgment affirmed.

## HUBBARD *et al.* v. BARRY.

<sup>1</sup> **EJECTMENT—PRIOR POSSESSION SUFFICIENT.**—The rule that the claimant in ejectment must recover upon the strength of his own title, is in this State so far modified that a plaintiff may recover upon proof of a possession prior to that of the defendant, notwithstanding it be shown that the real title is in a stranger, with whom neither party has any connection, and this, whether such real owner be an individual or a corporation, or the Government of the United States.

<sup>2</sup> **VAN NESS ORDINANCE, PURPOSE OF.**—The Van Ness Ordinance was framed upon the theory, that the better right to the bounty of the city vested with the first possessor, provided his possession was actual, and had not been voluntarily abandoned, and such prior actual possessor is entitled to the benefits of the ordinance, notwithstanding an interruption of his possession by the intrusion or trespass of others.

**GRANT OF JUSTICE OF PEACE VOID.**—A Justice of the Peace of San Francisco in 1849 had no authority as such to make grants of the pueblo lands of that city, and a grant made by him is inoperative for any purpose whatever.

<sup>1</sup> Cited as authority in *Richardson v. McNulty*, 24 Cal. 348; *Carleton v. Townsend*, 28 Cal. 223; *Harris v. McGregor*, 29 Cal. 129; *Toland v. Mandell*, 33 Cal. 43. See *Brumagim v. Bradshaw*, Jan. T. 1868 (not reported.); *Bradley v. Lee*, 38 Cal. 370; *Niagara M. Co. v. Bunker Hill M. Co.*, 59 Cal. 613. See 49 Miss. 385.

<sup>2</sup> Cited as authority in *Carleton v. Townsend*, 28 Cal. 223; *Brooks v. Tichnor*, Oct. T. 1868 (not reported); and see *Keane v. Cannovan*, ante 292; *Davis v. Perley*, 30 Cal. 687; *McLeran v. Benton*, April T. 1872 (not reported.)

## APPEAL from the Twelfth Judicial District.

\*The facts are stated in the opinion of the Court. [322]

*H. S. Love*, for Appellant.

I. It is conceded by the appellants that a plaintiff may recover in an action of ejectment simply upon prior possession without deraigning his title back to its original source, or to the sovereign power (where all title to lands in the first instance is vested.) This universal rule is founded on one of the most plain and simple propositions—that is, that the person having the possession of lands is presumed to be the owner, until the contrary appears. It will not be contended that prior possession of lands proves absolutely title in the possessor. At most, such possession is only presumptive title in the possessor, and although it might be conceded that a plaintiff had prior possession of a lot on a given day, yet if at the same time he conceded that he had no title, it would not be contended that he could maintain an action of ejectment to recover possession of the land. If the rule were otherwise, the law would be guilty of the absurdity of preferring one out of possession and without title, or the right of possession, to one in the actual possession.

If we are right in this, then it follows, that the plaintiffs cannot recover in this action. It is stipulated and agreed that the lands in question were a portion of the lands belonging to the Mexican pueblo, and that the Mexican pueblo was the “predecessor of the city of San Francisco.” It therefore follows, that if the title was in the city of San Francisco, it must remain there still, unless the city has parted with that title, and in no event can the plaintiffs in this action recover.

II. Assuming, then, (as is conceded,) that the title was in the city of San Francisco, and that the city has not parted with the title, or with the right of possession, unless the Colton grant conveyed such title; and assuming, for the sake of the argument, that Colton, as such Justice of the Peace, had no legal power to convey the interest of the city to the defendant, yet we say that within the principle of the case of *Hubbard v. Sullivan*, 18 Cal. 508, the defendant entered into

possession of the lot in question, and was in the actual possession of the same on the first day of January, 1855, [323] \*at the time of the passage of the Van Ness Ordinance, and that such grant by Colton to the defendant was effectual as a license from the city to the defendant to enter into possession of the lot and to hold the same, even if such grant was not operative to pass the title to the defendant; that although the grant made by Colton did not pass the legal title of the lot to defendant, yet upon the passage of the Van Ness Ordinance of 1855 and the Act of the Legislature of 1858 confirming it, the defendant holding this lot through the city and under this Colton grant, it operated as a license; and having such actual possession, he may be considered in law as having possession for the city of San Francisco, and will be protected against the prior possession of the plaintiffs or their grantors.

*S. W. Inge*, for Respondent.

Plaintiffs claim under White, who was in possession on the sixteenth of October, 1849, and so continued until he was forcibly evicted by the defendant, who now seeks to justify his trespass under a Colton grant. White's possession was a valid, legal possession upon which he or his vendors may maintain ejectment. (4 Cal. 94; 6 Id. 172, 649; 9 Id. 427; 5 Id. 87, 249, 266; 10 Id. 22.)

The Colton grant is invalid and inoperative for any purpose.

FIELD, C. J. delivered the opinion of the Court—COPE, J. and NORTON, J. concurring.

This is an action of ejectment for the recovery of certain real estate situated in the city of San Francisco. The premises constitute a portion of the municipal lands of the old pueblo. The plaintiffs rely upon the prior possession in 1849 and 1850 of one Thomas White, through whom they claim. The defendant rests his defense upon a grant issued by a Justice of the Peace of San Francisco, by the name of Colton, in December, 1849, and the alleged operation in his favor of the Van Ness Ordinance.

On the trial it was admitted, that in October, 1849, White, the grantor of the plaintiffs, entered into peaceable and ex-

clusive possession of certain lands of the pueblo, then vacant and unoccupied, \*and caused the same to [324] be accurately surveyed, and inclosed with a substantial and permanent fence; that he erected thereon a dwelling-house, store-house, and other houses, which were occupied by him and family as a residence and for business purposes; that in July, 1850, he leased a portion of the lands (that in controversy in the present action) for one year, and placed the lessee in possession; that while the lessee was in possession, the defendant entered upon the demised premises, and dispossessed him, and has ever since held the possession adversely to the plaintiffs.

The defendant's counsel does not question the doctrine, that in ejectment the plaintiff may recover against an intruder or trespasser upon proof of his having had prior possession of the premises. His position is, that as possession is merely presumptive evidence of title, it loses its efficacy when the title is shown to be outstanding in a third party; that the presumption arising from the possession is then met and overcome, and the basis upon which the action rests is removed. This is only another form of stating the general doctrine of the law, that the claimant in ejectment must recover upon the strength of his own title, and not upon the weakness of his adversary's, and that it is a sufficient answer to his action to show title out of him and in a third party. In *Coryell v. Cain*, 16 Cal. 572, we had occasion to observe, that this doctrine, undoubtedly true as a general rule, had been, to a certain extent, qualified and limited in this State from the anomalous condition of things arising from the peculiar character of the mining and landed interests of the country. "The larger portion of the mining lands," we there said, "within the State belong to the United States, and yet that fact has never been considered as a sufficient answer to the prosecution of actions for the recovery of portions of such lands. Actions for the possession of mining claims, water privileges, and the like, situated upon the public lands, are matters of daily occurrence, and if the proof of the paramount title of the Government would operate to defeat them, confusion and ruin would be the result. In determining controversies between parties thus

situated, this Court proceeds upon the presumption of a grant from the Government to the first appropriator of mines, water privileges, and the like. This presumption, which [325] would have no place for consideration as against \*the assertion of the rights of the superior proprietor, is held absolute in all those controversies. And with the public lands which are not mineral lands, the title as between citizens of the State, where neither connects himself with the Government, is considered as vested in the first possessor, and to proceed from him."

A similar rule is followed by us, though not founded upon a like presumption, in controversies for the possession of lands where the real title is not in the Government, but is in an individual with whom, or in a corporation with which neither party connects himself. The owner of the true title not objecting or consenting to the possession of either of the parties, the Court regards the better right, as between the parties, to be vested in the first possessor and grantees claiming through him. The rule rests upon its necessity for the preservation of peace and quiet in a country where titles to tracts of land, measured by leagues, are under consideration by the tribunals of the United States, and there is an indisposition, in numerous instances, on the part of claimants to assert their legal rights against the occupants until the final action of those tribunals. (See *Bequette v. Caulfield*, 4 Cal. 278, and *Bird v. Lisbros*, 9 Id. 5.)

The Van Ness Ordinance was framed upon the theory that the better right to the bounty of the city rested with the first possessor, provided his possession was actual—that is, accompanied with the real and effectual enjoyment of the property, and had not been voluntarily abandoned. And while it fixes the date at which such actual possession must have existed, to entitle a party to its benefits, prior to or on the first of January, 1855, it specially excepts parties from the necessity of establishing a continued actual possession, where such possession had been interrupted by the intrusion or trespass of others.

We do not perceive how the grant of the Justice of the Peace, Colton, could have conferred any rights upon the defendant. No law has been cited to us authorizing any



disposition by the Justice of the lands of the pueblo. In the absence of such authority the grant was inoperative for any purpose.

Judgment affirmed.

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\*BLOCKLEY *et al.* v. FOWLER *et al.* [326]

**PURCHASE BY MORTGAGEE AT MORTGAGE SALE.**—Where, at a sale under a power contained in a mortgage, the mortgagee becomes the purchaser indirectly by having the mortgaged premises bid in for himself, such sale is not therefore void, but only voidable on the application in equity of the mortgagor. The legal title passes by the sale.

**INSTRUCTION AS TO FRAUD ERRONEOUS.**—In an action of ejectment where the defendant claimed title through a purchase made at a sale under a power contained in a mortgage, the Court gave the following instruction: "If the jury believe from the evidence, that M. B. McKinney, the mortgagee mentioned in the mortgage, made by A. M. Jackson to him on the fifteenth day of May, 1850, employed W. H. Fairchild, the purchaser, to attend said sale as his agent, and to buy in the property specified in said mortgage at said sale for the benefit of said McKinney himself, and that said Fairchild was not a *bona fide* purchaser, but purchased said property for said McKinney, and that no consideration was passed between said Fairchild and said McKinney, then the sale was void." The jury found for plaintiffs who had judgment: *Held*, on appeal, that the instruction was erroneous in pronouncing the sale void on the supposed state of facts, and that, for this error, the judgment must be reversed.

**APPEAL from the Fifth Judicial District.**

This was an action of ejectment for two lots in the city of Stockton. The plaintiffs' title was derived as follows: 1st, a grant from the Mexican Government to C. M. Weber, admitted by stipulation to be a valid title; 2d, a deed from Weber to A. M. Jackson, dated February 13th, 1850; 3d, a deed from Jackson to Blockley, dated December 30th, 1859; 4th, a deed from Blockley to Weeks, his coplaintiff of an undivided half, on the sixteenth day of January, 1860.

The defendants' title was derived as follows: 1st, the deed from Weber to Jackson, above mentioned; 2d, a mortgage from Jackson to M. B. McKinney, dated May 15th, 1850, to secure a debt of \$3,234. Said mortgage contained a power of sale in default of payment to satisfy the debt—the sale to be made by the mortgagee, upon his giving ten days' public

notice of the time and place of sale, which notice was to be published by posting in some public place in the town of Stockton; 3d, a sale of the property by McKinney, at public auction under the power in the mortgage, at which sale one Fairchild became the purchaser at the price of one hundred and ten dollars, receiving a deed from McKinney on [327] the second \*day of November, 1850; 4th, a reconveyance by deed from Fairchild to McKinney on the same day, to wit: November 2d, 1850, and at the same price at which the property was bid in by Fairchild; 5th, a deed from McKinney to the defendant Fowler, dated September 12th, 1853, for the lots in controversy, which deed contained full covenants of warranty. The consideration paid was five hundred dollars.

The testimony of Fairchild, called by defendant as a witness, shows that he was employed by McKinney as his agent to purchase in the property at the sale, and that he did purchase it for McKinney and as his agent; that he never paid any consideration on the transfer to him, and that he conveyed to McKinney without any money being paid him on the same day that he acquired it.

Evidence was introduced by defendant tending to show that the sale by McKinney was made pursuant to this power, and that due notice thereof was given, but this evidence it is not necessary to state, as the point was not decided by the Court.

The jury, under the instruction set forth in the opinion, found a verdict for plaintiff. A motion for a new trial was made and overruled, and defendant has appealed to this Court from the final judgment and from the order denying the motion for a new trial.

*Hall & Huggings*, for Appellants.

The instruction given, at the instance of the plaintiff to the effect that McKinney's purchase at the sale of the second of November, through Fairchild as his agent, rendered the sale void, was not law. The principle announced should have been made dependent upon the existence of one other essential fact, to wit: that the jury must believe that Jackson had not acquiesced in such sale but had disagreed to the same. (*Jackson ex dem. McCarty v. Van Walfren*, 5 Johns. 43.)

The case of *Jackson ex dem. of Cadwallader & Colden v.*

*Walsh*, 14 Johns. 406, runs on all fours with this. They differ only in several immaterial particulars. The plaintiff Colden claimed title as heir at law, whereas here the plaintiffs allege that they are purchasers for value. Colden, whose sale for his own benefit was impeached, acted in the character of an executor with power to \*sell, and not, [328] as in the case at bar, in the capacity of a trustee by virtue of a deed. Thompson, C. J. delivering the opinion of the Court says: "It is unnecessary for me to go into an examination of the equity doctrine on this subject. No case is to be found where a Court of Law has pronounced such a deed *absolutely void*. The legal title undoubtedly passes, and the rules and principles which govern the Court of Chancery in such cases show that it would be very unfit for a Court of Law to interpose and set aside such conveyances. (2 Johns. 226.) Indeed, it is not the doctrine of a Court of Equity that such sales are *ipso jure* void, but that the purchaser, subject to the equity of having the sale set aside if the *cestui que trust*, in a reasonable time, chooses to say he is not satisfied with it."

In the case of *Slee v. Manhattan Company*, 1 Paige, in the opinion of Judge Betts it is said: "The rule laid down by Lord Thurlow in *Crow v. Ballard*, 3 Bro. Ch. Co. 119, that it is impossible at any rate that the person employed to sell can be permitted to buy, has been explicitly denied in the English Courts and ours, and is now no longer followed. The principle now recognized is, that he is entitled to no advantages from his purchase, but it is at the option of the *cestui que trust* to consider him a trustee and as holding the estate in his behalf." (And see authorities there cited; *Scott v. Freeland*, 7 Sme. & Mar. 419.)

The acquiescence of Jackson in the sale by McKinney would cut off the right of the former to set aside the sale, even in a Court of Equity. Yet the Court below, at law, refused to instruct the jury, that such acquiescence would operate to estop Jackson and the plaintiffs under him from disaffirming the sale in ejectment. The authorities establish the rule that the sale is not void, but the *cestui que trust* may within a reasonable time, if he disapproves, proceed to have the sale annulled by a Court of Equity. If he fails thus to

proceed, his acquiescence will be presumed, and the Court will refuse to disturb the sale, and more especially will withhold relief as against a purchaser for a valuable consideration without notice. (See, on the point of presumption of notice, 10 Sme. & Mar. 583; 8 Id. 493; *Buchanan et al. v. Tinner et al.*, 2 How. 261-263; *Wilson v. Troup*, in the opinion and decision of Chancellor Kent, 2 Cow. 203; 1 Pet. 368.)

[329] \**E. L. Goold and D. W. Perley*, for Respondents.

NORTON, J. delivered the opinion of the Court—FIELD, C. J. and COPE, J. concurring.

This is an action to recover the possession of real estate. The plaintiffs and defendants both claim under A. M. Jackson, the latter under a mortgage sale and the former under a deed. In 1850, May 15th, Jackson executed a mortgage to one McKinney, with a power to sell on default in payment of the mortgage debt. Acting under this power McKinney sold the property on the second day of November, 1850, which was bid in by one Fairchild who, on the same day, reconveyed the property to McKinney, and the latter, on the twelfth day of September, 1853, conveyed to the defendant Fowler, who took possession in 1854, and has since occupied. On the thirtieth day of December, 1859, Jackson made a deed of the premises to the plaintiff Blockley, and this action was commenced on the twenty-fourth day of February, 1860.

On the trial, upon the request of the plaintiffs, the Court gave the following instruction to the jury: "If the jury believe, from the evidence, that M. B. McKinney, the mortgagee mentioned in the mortgage made by A. M. Jackson to him on the fifteenth day of May, 1850, employed W. H. Fairchild, the purchaser, to attend said sale as his agent, and to buy in the property specified in said mortgage at said sale for the benefit of said McKinney himself, and that said Fairchild was not a *bona fide* purchaser but purchased said property for said McKinney, and that no consideration was passed between said Fairchild and said McKinney, that then the sale was void."

This charge was erroneous. A mortgagee who sells under a power contained in the mortgage and becomes himself the

purchaser indirectly by having the mortgaged premises bid in for himself, cannot hold it against the mortgagor if the latter chooses to file his bill to set aside the sale or to redeem, provided this be done within a reasonable time after being apprised of the sale. But the sale is not void. It is only voidable. The legal title passes. (*Jackson v. Van Dalpen*, 5 J. R. 43; *Jackson v. Walsh*, 14 Id. \*407; [330] *Bergen v. Bennet*, 1 Caines' Cases in Error, 1; *Slee v. Manhattan Company*, 1 Paige's Ch. 48; *Davone v. Fanning*, 2 J. Ch. 252; *Scott v. Freeland*, 7 Sme. & Mar. 409.)

It is also insisted that the sale was void, on the ground that the notice of sale required by the power was not given. Some of the above cited cases show that such an irregularity, if it occurred, might have been acquiesced in by the mortgagor, and if so, the sale would not be void. It is impossible for us to say how the jury might have found upon this point, or as to the fact of notice having been given, if the case had been properly submitted to them, because under the instruction given, as above stated, the jury, with the testimony of Fairchild as to his having purchased for McKinney unquestioned, could not have done otherwise than find for the plaintiff.

For this error the judgment must be reversed, and the cause remanded for a new trial. The costs of this appeal to abide the event.

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### VAN VALKENBURG v. McCLOUD.\*

**PUBLIC LANDS SUBJECT TO LOCATION UNDER SCHOOL WARRANTS.**—The public lands of this State were, previous to their survey by the General Government, subject to location by the holders of school warrants issued under the Act of May 3d, 1852, **SELECTION OF STATE LANDS.**—*Doll v. Meador*, 16 Cal. 296, affirmed upon the points that the Act of Congress of September, 1841, donating lands for internal improve-

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\*Cited as authority in *Higgins v. Houghton*, 25 Cal. 255. See *Bludworth v. Lake*, 33 Cal. 261; *Doll v. Meador*, 16 Cal. 296. Upon the point that such selection could be made before survey, overruled in *Terry v. Megerle*, 24 Cal. 609; and see *Grogan v. Knight*, 27 Cal. 520; *Megerle v. Ashe*, 33 Cal. 89; *Smith v. Athearn*, 34 Cal. 512; *Toland v. Mandelle*, 38 Cal. 33; *Hastings v. Devlin*, 40 Cal. 363; *Flint v. Bell*, Oct. T. 1870 (not reported.) *Sherman v. Binoh*, 45 Cal. 668.

ments, is as to the States to be subsequently created a grant *in presenti*, and veste in each of them immediately upon its admission 500,000 acres of the Government lands within its boundaries, not reserved from sale, with the right to select the same in such manner as its Legislature may direct; that such selection may be made before the land is surveyed by the Government, but must be subject to change if subsequently, upon the survey being made, it be found to want conformity with the lines of such survey.

LOCATION BEFORE SURVEY VOID.—C. being the holder of two school warrants issued under the State Act of May 3d, 1852, located with them, in November of that year, three hundred and twenty acres of public land, of which no survey had at that time been made by the General Government, took possession of the same and occupied it until 1857, when he conveyed the premises with the warrants to M., and he subsequently to the defendant, who took and has since retained the possession. The original selection was not strictly in conformity with the lines of the subsequently made survey of the United States, but after such survey the defendant caused its boundaries to be changed so as to conform with the lines of the sectional divisions established by the survey, and deposited his warrants in the United States Land Office of the district. The plaintiff claims under a location of other school warrants made by him upon the same land after the survey by the United States. In ejectment by plaintiff to recover the land of defendant: *Held*, that the location by C. before the Government survey was valid, and that the title of defendant should prevail.

#### APPEAL from the Fifth Judicial District.

This is an action of ejectment to recover three hundred and twenty acres of land in San Joaquin County. Both parties claim under the State of California, under locations made with warrants issued under the Act of 1852, commonly called School Land Warrants. From the findings of the Court, it appears that in 1852 one James L. Carnduff entered upon the premises, which were vacant unsurveyed land of the United States, and in October of the same year, purchased from the State two school land warrants, which he caused to be located on the premises by the County Surveyor—the location being duly recorded in the Clerk's office on the eighteenth of December, 1852.

Carnduff built a house upon the premises, where he resided, cultivating the land, exercising control and ownership over it, until the tenth of June, 1857, when he conveyed the land, by a quitclaim deed, and assigned the warrants to Alonzo McCloud, who, in September of the same year, conveyed the land and assigned the warrants to the defendant, who entered upon the land and has continued in possession up to the present time. The survey and location made by the County Surveyor in 1852 embraced nearly the whole of

the land in controversy, and the possession of defendant and his grantors was coextensive with that location. In 1858, after the land had been surveyed by the United States, defendant caused the lines of the original location to be so changed as to conform with the United States survey, and afterwards deposited his warrants in the United States Land Office of the district. The possession of the defendant and those under whom he claims has been uninterrupted since October, 1852—a period of nearly ten years.

The plaintiff claims under a location with school land warrants \*made in the United States Land Office [332] at Benicia, in June, 1856, shortly after the lands were surveyed by the United States Government. He had at the time actual notice of the claim, location, and possession of defendant's grantor. Plaintiff has never been in possession of the land, and bases his right to recover upon a supposed title acquired by his location in the United States Land Office.

The defendant had judgment in the Court below, and plaintiff appeals. A full abstract of the laws of Congress and of this State bearing upon the questions involved will be found in the report of *Doll v. Meador*, 16 Cal. 296.)

*O. M. Brown*, for Appellant.

The third section of the Act of the Legislature of this State, passed May 3d, 1852, declares: "That no location shall be made unless it be made in conformity with the law of Congress."

The Act of September 4th, 1841, grants to the State of California 500,000 acres, and allows the selections to be made, as the Legislature may direct, (that is the manner) "at any time after the lands of the United States in such State shall have been surveyed according to existing laws." (Act of 1841, sec. 8.) A selection, to be in accordance with the law of Congress, must be after the survey and return of the plats, otherwise, it would seem that a selection might be made without any regard to the law of Congress.

Section three of the circular of the General Land Office is as follows: "The selections must be based upon the official township plats of the public surveys, which are required to be approved by the Surveyor-General, and on file in the local

land office for thirty days prior to the time of filing the selection."

If, then, the law and instructions mean anything, the Carnduff location in 1852, by survey of the County Surveyor, and recording in the Clerk's office, on this unsurveyed land, amounted to nothing, being in direct contravention of the plain letter and evident spirit of the law.

If the United States direct the manner of selection, then the direction must be followed. If not followed, no approval will be made or patent issued to the State. If the [333] State or her agents \*act in utter disregard of such law and instructions, and yet claim land assumed to be located, as that by Carnduff, the succeeding acts of approval by the United States, through her agents, are totally unnecessary and useless. Why call upon the United States to approve a selection and subsequently issue a patent to land, when the State claims her own selection to be final and conclusive of her rights? Why ask for approval? Why seek a patent? Yet not one selection has ever been made without the condition annexed that it be approved by the United States.

The United States have never approved the selection made by Carnduff in 1852; in fact, the Government had no knowledge of any such selection. In 1855 the land was surveyed, and the plats returned to the land office in the district. About January, 1856, Van Valkenburg made a selection of the land in controversy, and surrendering his warrants to the Register of the Land Office, received a certificate of location from the United States Resister. Van Valkenburg's warrants were surrendered at the time of his location to be canceled; whereas the Carnduff warrants were in circulation until within a short time previous to the trial of this case, and might with the greatest facility have been sold to and passed through a dozen hands, and also have been relocated on other and different land. It results, then:

1st. That Carnduff's location was invalid.

2d. That Van Valkenburg's was made according to law, and is valid.

3d. That McCloud's subsequent relocation in 1858 (that is, his changing the lines of his location so as to conform to



the lines of the subsequently made survey of the United States) was too late.

4th. That in order to have secured a valid location, and thereby have prevented the location by Van Valkenburg, the relocation by Carnduff should have been made and approved in the United States Land Office within thirty days after the filing of the plats of survey therein.

*D. S. Terry, for Respondent.*

The appellant relies solely on the point, that no location of \*school warrants, issued under the Act of [334] 1852, could be made upon unsurveyed lands. This question has been already before the Court, and was, after full argument, settled in the case of *Doll v. Meador*, 16 Cal. 295, in which the Court held that the Act of the Legislature authorizing the location of warrants on unsurveyed lands did not conflict with the law of Congress, passed in 1841, donating lands to several States. That the effect of the language of the Act of 1841 was to confer upon the State of California upon her admission a present vested interest in 500,000 acres of land, "with a right to select out of any public lands of the United States, except such as were or might be reserved from sale by any law of Congress or the proclamation of the President."

The Act of Congress imposes no other restriction upon the right of selection, except that not less than three hundred and twenty acres shall be taken in one location, and the lines shall be made to conform to the surveys to be made by the United States.

The selection made by respondent's grantor was in strict accordance with the law of California; the location was made by the County Surveyor; was duly recorded in the proper office; and, after the land had been surveyed by the United States, its boundaries were changed, and made to conform with such survey. The warrants have been filed in the United States Land Office of the district; and under the Act of April, 1859, to provide for the issuance of patents to lands located with State school land warrants, respondent is now entitled to recover from the State a patent for the lands. He has a full and complete equitable title, having complied with all

the requirements of the law, and need only apply to the proper officer for the patent, which will vest in him the perfect legal title.

Upon his own showing, the appellant has neither a legal nor equitable title to the land in controversy. His argument is based upon the assumption that the legal title to the land is in the United States. If this be so, he cannot recover, and the judgment must be affirmed. To recover in this action, appellant must have had either prior possession or legal title; he does not pretend to have had either. But if an equitable title was sufficient, he has shown no equity. He sought to purchase from the State a tract of land, [335] \*which had already been sold to another, of which fact he had actual notice, according to the findings of the Court, as well as constructive notice by the records of the county.

FIELD, C. J. delivered the opinion of the Court—COPE, J. concurring.

In *Doll v. Meador*, 16 Cal. 296, we had occasion to consider the effect of the eighth section of the Act of Congress of September, 1841, by which 500,000 acres of land were donated to several States, designated by name in its first section, and the same quantity to each new State which should be thereafter admitted into the Union. The language of the section with reference to the States designated differs materially from its language with reference to new States which might subsequently be created. As to the old States, the words are inoperative to pass the fee from the General Government. It was so held by the Supreme Court of the United States in *Foley v. Harrison*, 15 How. 447. "The words of the Act of 1841," said the Court, "are that 'there shall be granted to each State,' not that there is hereby granted. The words import that a grant shall be made in future." The very terms, the absence of which was thus considered as excluding a construction giving to the act the operation of a present grant to the old States, are used when new States are referred to. The language as to the new States is, "there shall be and hereby is granted" to each of them, upon its admission into the Union, the quantity designated. This language imports a

present, not a future grant, and it operates to vest the specific quantity in each new State immediately upon its admission into the Union. California, therefore, upon her admission acquired a present and vested interest in the 500,000 acres, with a right to select the same, in such manner as her Legislature might direct, out of any of the public lands of the United States, except such as were or might be reserved from sale by any law of Congress or the proclamation of the President—the selections to be made in parcels conformably to sectional divisions and subdivisions prescribed by the general system of surveys of the United States, and of not less than three hundred and twenty acres each. With reference to the old States, the act provides that the selections may be made at any \*time *after* the public lands [336] in those States respectively have been surveyed according to existing laws. But with reference to the new States, the *time* at which the selections may be made is not designated. The concluding words of the grant to them—providing that the land is “to be selected and located as aforesaid”—refer (as we held in *Doll v. Meador*) only to the manner and form of the selection, and the quantity which the several parcels must embrace. As we said in that case: “Conformity in the locations with the sectional divisions and subdivisions is required to preserve intact the general system of surveys adopted by the Federal Government, and to prevent the inconvenience which would ensue from any departure therefrom. When, therefore, any location is made by the State previous to the survey of the United States, it must be subject to change if subsequently, upon the survey being made, it be found to want conformity with the lines of such survey. With this qualification, and the further qualification of a possible reservation by a law of Congress or a proclamation of the President previous to the survey, which may require further change or the entire removal of the location, we do not perceive, either in the language of the act or the object to be secured, any limitation upon the right of the State to proceed at once to take possession and dispose of the quantity to which she is entitled by the grant. It would hardly be pretended that she would be deprived of the bounty of the General Government if no surveys were ever directed

by its authority, or that the enjoyment of the estate vested in her would be suspended indefinitely by reason of its inaction in the matter. The legislation of the State has proceeded upon a construction of the Act of Congress similar to that which we have given, and under it interests of great magnitude have grown up, any disturbance of which would lead to consequences greatly to be regretted."

At the time the opinion was rendered from which this citation is taken, (October, 1860,) the selections made under the authority of the State from unsurveyed lands exceeded 150,000 acres. Since then the number must be greatly increased; and so long as the restrictions upon the action of the State, in making the selections provided by the Act of Congress, are secured, it is difficult to perceive the force of the objections urged against a selection from [337] \*unsurveyed lands. In *Doll v. Meador*, we held that objections, such as are made in the present case, were untenable, and we reaffirm the decision in that respect.

This conclusion disposes of the appeal. The selection of Carnduff was made by the location of school warrants in December, 1852. These warrants were in fact powers of attorney from the State, authorizing the holder to select for her three hundred and twenty acres of the 500,000 donated by the United States. Carnduff was in the possession of the premises at the time, and he erected a dwelling-house thereon, in which he resided, cultivating the land, and exercising ownership over it, until June, 1857, when he conveyed the premises, together with the warrants, to Alonzo McCloud, and the latter, in September of the same year, conveyed them to the defendant, who immediately entered upon the premises, and has continued in their possession ever since. The original selection was not strictly in conformity with the lines of the subsequently made survey of the United States, but after such survey the defendant caused it to be changed so as to conform with the lines of the sectional divisions and subdivisions established by the survey, and deposited his warrants in the United States Land Office of the district. The plaintiff claims under a location of school warrants made in the land office of Benicia, after the survey of the United States, and he relies for a recovery upon the alleged invalidity

of the location of Carnduff in 1852, because made on unsurveyed land. This ground of reliance, for the reasons we have stated, fails him in the case.

Judgment affirmed.

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### PEOPLE v. BRANNIGAN.

<sup>1</sup> **SEPARATION OF JURORS AN IRREGULARITY.**—Where the jury in a criminal action, after having retired to deliberate upon their verdict, separate without permission of the Court, the irregularity is sufficient ground for setting aside a verdict of guilty rendered by them, unless it be shown affirmatively by the prosecution that the defendant was not prejudiced thereby.

**EXPRESSIONS OF THIRD PARTIES.**—A verdict of guilty in a criminal action will not be set aside on a showing that a third person expressed in the presence [338] of the jury, while they were deliberating upon their verdict, a wish that the defendant should be convicted, where the expression appears to have been a mere passing remark and not part of a conversation in which the jury engaged.

#### APPEAL from the Court of Sessions of Sacramento County.

The defendant was indicted for the crime of rape, and was convicted.

A motion for new trial was made by him, in support of which he filed an affidavit, setting forth, among other things, that the jury after they had retired under charge of an officer to deliberate upon their verdict separated without leave of the Court, or consent of the parties; also setting forth that they were taken by the officer across the street to a hotel for the purpose of taking dinner; that while there the proprietor of the hotel had a conversation with one or more of them, in which he used the following language: "Stick to it until you rot and the pismires carry you out, but what you convict him." No counter-affidavits were filed.

The motion for new trial was denied, and defendant sentenced to ten years' imprisonment. From the order refusing a new trial defendant appeals.

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<sup>1</sup> Cited and explained in *People v. Symonds*, 23 Cal. 352; and cited as authority in *People v. Turner*, 39 Cal. 375; and see *People v. Colmere*, 23 Cal. 633; *People v. Hughes*, 29 Cal. 257.

*R. H. Lloyd*, for Appellant.

*J. W. Coffroth*, for the People

FIELD, C. J. delivered the opinion of the Court—COPE, J. and NORTON, J. concurring.

The statute regulating proceedings in criminal cases provides that when the jury do not agree, after a case has been submitted to them, without retiring for deliberation, one or more officers shall be sworn "to keep them together in some private and convenient place, and not to permit any person to speak to them, nor to speak to them themselves, unless it be to ask them whether they have agreed upon a verdict, and to return them into Court when they have so agreed." (Sec. 402.) And it empowers the Court to grant a new trial "when the jury have separated without leave of the Court after retiring to deliberate upon their verdict, or been guilty [339] of any mis\*-conduct tending to prevent a fair and due consideration of the case." (Same Act, sec. 440.) The object of the first provision is to remove the jury from all improper influences in their deliberations; and the object of the second provision is to furnish a remedy where the jury have been subjected to such influences, or been themselves guilty of misconduct tending to affect the purity of their verdict.

The language of the oath administered to the officer having the jury in charge points out with clearness his duties. He is required "to keep them *together*;" that is, he must not permit them to separate. He must keep them "in some *private* and convenient place;" that is, removed from access by strangers. He must not "permit any person to speak to them," a duty which can only be performed by following the previous requirement of keeping them in a private place. And, finally, he must not speak to them himself, except to ask them whether they have agreed upon a verdict. When either of these requirements is disregarded by the officer, he fails to perform his duty, and the trial is irregularly conducted. If a conviction follows, the prisoner has ground to complain of the irregularity. He is entitled to all the protection which the statute intends to secure, against any

interference with the action of the jury, whether arising from the hostility of personal enemies or popular prejudice. If such protection be not afforded, suspicions are excited and confidence in the justice of their decision is destroyed. It would seem therefore but reasonable, where an irregularity has been committed, which *may* have affected the jury, that the Government, seeking to uphold their action, should be called upon to show that no injury to the prisoner has followed from the irregularity complained of. If this can be shown, their verdict will not be disturbed—for the end which the law contemplated by its provisions has been attained. In the present case the irregularity consisted in the unauthorized separation of the jury, after retiring to deliberate upon their verdict. The prisoner, in his affidavit, upon which the motion for a new trial was based, alleges the separation, and the fact is not controverted, nor is any explanation of it attempted by the State. The District Attorney appears to have considered it incumbent upon the prisoner to show affirmatively injury to him-\*self resulting from [340] the separation, or at least reason to suspect such injury. There are authorities which support this view. Such are the cases cited from the New York Courts. But there are authorities of equal weight the other way, and the latter, we think, are supported by better reasons. In *Commonwealth v. McCaul*, (Va. Cases, 305,) the General Court of Virginia held that the separation of itself vitiated the verdict, although it affirmatively appeared in that case that no improper influences had been brought to bear upon the jury. “From the mode,” said the Court, “in which collusion and tampering is generally carried on, such circumstance is generally known to no person except the one tampering and the person tampered with, or the persons between whom a conversation may be held which might influence the verdict. If you question either of these persons on the subject, he must criminate or declare himself innocent, and you lay before him an inducement not to give correct testimony.” And after observing that the ancient rule, that the jury should on no occasion separate, had been relaxed only in cases of imperious or unavoidable necessity, the Court continued: “But by allowing that a jury may separate without necessity, and that their

verdict shall stand, unless the party accused, who in these cases is in the custody of the law, can show that the jury not only have separated, but that they or a member of it, has also been tampered with, or held communication on the subject, this great barrier against oppression may gradually be sapped and undermined, and the bulwark cannot long remain. Such a precedent would be productive of evils incalculable, and too great for the Court by its decision to allow a door to be opened for them."

This case, so far as it holds that separation alone vitiates the verdict in a criminal case, even when shown to have produced no injurious consequences, has been generally condemned, but in other respects has been followed in several of the States. In *McLain v. The State*, 10 Yerger, 242, the Court said: "The affidavits, which are uncontradicted, show conclusively that several of the jury repeatedly separated from the others, without the care of the officer appointed by the Court to attend them, and were absent for the space of fifteen or twenty minutes—long enough to have been tampered with, if there had been any disposition to do so. It is [341] \*not necessary for the prisoner to prove that they were, during their absence, subjected to improper influences from others; it is sufficient if they might have been. There would be no safety in a different rule of practice, for it would be almost impossible ever to bring direct proof of the fact that it was done." (See also *Riley v. The State*, 9 Humph. 654; *McCann v. The State*, 9 Smedes & Marsh. 465.)

In the case of *The State v. Prescott*, 7 N. H. 287, the Supreme Court of New Hampshire, after an extended consideration of the authorities, held that the burden of proof lay upon the Government to show that the prisoner had not suffered any injury by reason of the separation of the jury, and that in the absence of such proof he was entitled to the benefit of the presumption that the irregularity had been prejudicial to him. "The prisoner," said the Court, "is in such case entitled, as a matter of right, to require, in the first instance, a compliance with the ordinary forms provided by the law to secure to him a fair and impartial trial; and if the guards provided for his security are neglected or disregarded, he is at least entitled to require, at the hands of the Govern-



ment, satisfactory evidence that he has not received detriment by reason of such neglect, and is not to be put to show, affirmatively, that such departure from the customary mode of trial has been the probable cause of his conviction. The shield which the law has provided would fall far short of affording him the protection intended, if it might be thrown aside at pleasure, and he have no right to complain unless he could prove that the want of it had been actually prejudicial to his case; a matter which it might in many cases be very difficult to prove, notwithstanding such was the fact. He has the right, therefore, to call upon the officers of the Government in such case, before they demand judgment, to show that the irregularity in the trial has not been the means of injustice in the verdict."

In the several cases from which we have thus cited the separation occurred before the jury had retired to deliberate upon their verdict, but the reasons advanced apply with equal force to separations afterwards.

In addition to their unauthorized separation, the defendant also \*alleged misconduct of the jury as [342] ground for a new trial. It appears from the record that while the jury had the case under consideration, and before they had agreed upon a verdict, they were taken by the officer who had them in charge to a hotel opposite the room in which they were deliberating to get their dinner, and while there the proprietor of the hotel spoke to some of the jurors and told them to convict the defendant. The affidavit upon which the new trial was asked states that the proprietor had a conversation with one or more of the jurymen, but we regard the language used as a mere passing remark of the proprietor. If, indeed, there was a conversation—that is, if language was used by both parties, or if used by one was listened to by the other—then there was such misconduct as to authorize, for that reason, the annulling of the verdict. But as a passing remark of the proprietor it did not, however improper, constitute misconduct of the jury. For making it the proprietor not only merited the reprimand of the Court, but should have been severely punished as for a contempt. The fact that the jury were exposed to remarks of this character sufficiently shows the impropriety of taking them

to the hotel, where they were liable to come in contact with strangers, and the wisdom of the provision requiring the officer to keep them together in some *private* place.

Judgment reversed, and cause remanded for a new trial.

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### VAN WINKLE v. HINCKLE.

<sup>1</sup> **ACTION TO QUIET TITLE CANNOT BE MAINTAINED AGAINST TENANT.**—An action cannot be maintained under the two hundred and fifty-fourth section of the Practice Act, by a landlord against his tenant in possession for the purpose of determining the validity of an adverse title set up by the tenant.

**ACTION AGAINST WHOM IT LIES.**—The section of the statute above referred to must be construed as giving a remedy only against parties who are in a position to assert their rights, and not against those who are barred by a temporary estoppel as to the right asserted on the other side.

**RENUNCIATION OF TENANCY.**—If a tenant renounce the tenancy in favor of an adverse title the landlord may elect to consider himself ousted and maintain ejectment, but he cannot claim possession through the tenant and at the same time bring an action against him to determine the title.

[343] \*APPEAL from the Sixth Judicial District.

The facts are stated in the opinion of the Court.

*J. B. Harmon*, for Appellant, cited: Practice Act, sec. 254; *Ritchie v. Dorland*, 6 Cal. 33; Story's Eq. Jur., secs. 852-856.

*J. W. Winans*, for Respondent.

Plaintiff avers in his complaint, that he is in possession; that appellant whom he sues is his tenant, by a specific contract of lease, and that, notwithstanding the allegation thereof, appellant bought an outstanding claim of title which she sets up adversely. This brings respondent's case directly within the purview of section two hundred and fifty-four of the Practice Act. (*Curtis v. Sutter*, 15 Cal. 259; *Pixley v. Huggins*, Id. 133, 134;) in which latter case the Court clearly and fully determines in what cases an action can be brought

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<sup>1</sup> Commented on in *Lyle v. Rollins*, 25 Cal. 438; and cited in *Praus v. Jefferson G. & S. M. Co.*, 34 Cal. 559. See *Rico v. Spence*, post 504, note 1.

to remove a cloud upon a title, and the present action is within the rule as there laid down. (See, also, opinion of Chancellor Kent in *Trustees of Huntington v. Nicoll*, 3 Johns. 590, 591; *Cupps v. Irwin*, 2 Blackf. 112; *Douglass v. Scott*, 5 Hammond, Ohio, 195; *Norton v. Beaver*, Id. 178; *Douglass v. McCoy*, Id. 522.)

COPE, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action to quiet the title to certain real estate in the city of Sacramento. The complaint alleges that the defendant is in possession as the tenant of the plaintiff, but disclaims the tenancy, and sets up an adverse title in himself. The judgment enjoins the defendant from asserting his title, and establishes that of the plaintiff.

We are of opinion that the judgment is erroneous, and that the action cannot be maintained. The statute provides that "an action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate, or interest." (Prac. Act, sec. 254.) Taken literally, this provision is broad enough, perhaps, to authorize an action \*against the tenant himself, but there are con- [344] clusive reasons why it should not be so construed as to give it that effect. It is a rule of public policy that a tenant cannot dispute the title of his landlord, and it is not to be supposed that the intention was to interfere with this rule, or furnish the means of depriving the tenant of a right which, as tenant, he is precluded from defending. A tenant may acquire an adverse title, but he cannot use it against the landlord so long as the tenancy continues; and unless we are to admit an exception in this respect the effect of the action would be to cut him off without an opportunity to be heard. We do not regard the statute as intending either of these results, but as giving a remedy against parties who are in a position to assert their rights, and are not bound by a temporary estoppel as to the right asserted on the other side. If a tenant renounce the tenancy in favor of an adverse title, the landlord may elect to consider himself ousted, and main-

tain ejectment; but he cannot claim possession through the tenant, and at the same time bring an action against him to determine the title. There is nothing in any of the previous decisions of this Court in conflict with these views, and the cases cited by the counsel for the plaintiff have no bearing upon the question.

Judgment reversed, and cause remanded.

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### THE PEOPLE v. VICE.

<sup>1</sup> **INDICTMENT FOR ROBBERY.**—An indictment for robbery which fails to allege that the property taken was the property of some person other than the defendant, is fatally defective.

**OWNER CANNOT ROB ANOTHER OF HIS OWN PROPERTY.**—The owner of property is not guilty of robbery in taking it from the person of the possessor, though he may be guilty thereby of another public offense.

#### APPEAL from the Court of Sessions of El Dorado County.

The defendant, Vice, was indicted jointly with one Ben-thusen for robbery, and was tried separately and convicted. The indictment charges that the defendants, at a certain time and place, “did violently and feloniously take money of the following description and value, to wit: three twenty [345] dollar gold pieces, one five \*dollar gold piece, one two and one-half dollar gold piece, and three half dollars of silver coin, all of said pieces being of the coin of the United States of America, and of the value altogether of sixty-nine dollars, from the person of another, to wit: from the person of Jesse A. Bandy, by force, threats, and intimidations, and against the will of the said Jesse A. Bandy, contrary to the form of the statute,” etc. The indictment was not demurred to, but after the trial and verdict of guilty a motion in arrest of judgment was made on the ground that the indictment did not charge that the property taken was not the property of the

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<sup>1</sup> Cited as authority in *People v. Shuler*, 28 Cal. 494; *People v. Hughes*, April T. 1871 (not reported.)

defendant, or was the property of any person other than the defendant. The motion was overruled, and defendant sentenced to one year's imprisonment.

Defendant appeals.

*M. C. Callum & Eastman*, for Appellant.

*Attorney-General*, for Respondent.

FIELD, C. J. delivered the opinion of the Court—COPE, J. concurring.

The indictment in this case is for the offense of robbery, but in the statement of facts constituting the offense there is a fatal defect. The statement contains no allegation as to the ownership of the property of which the party named was robbed, or that it did not belong to the defendant. It is not necessary that the property should belong to the party from whose possession it was forcibly taken. It is requisite, however, that it should belong to some other person than the defendant. The owner of property is not guilty of robbery in taking it from the person of the possessor, though he may be guilty of another public offense.

Judgment reversed, and cause remanded.

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**\*HART v. ROBERTSON.**

[346]

**GIFT TO WIFE SEPARATE PROPERTY.**—Real estate conveyed to the wife during coverture by way of gift is her separate property, and she can maintain ejectment for its recovery after her husband's death without reference to any administration upon his estate.

<sup>1</sup> **TENANT IN COMMON ENTITLED TO POSSESSION.**—One tenant in common is entitled to the possession of the entire tract held in common against all persons but his cotenants and parties claiming under them, and as a consequence can maintain against them an action for its recovery.

<sup>2</sup> **CONVEYANCE TO WIFE COMMUNITY PROPERTY.**—Real property conveyed to the wife during coverture by deed of bargain and sale for a valuable consideration, becomes thereby the community property of herself and husband, and upon his

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<sup>1</sup> See note 4 under *Mahoney v. Van Winkle*, post 552; *Toucharl v. Keyes*, ante 220, note 1.

<sup>2</sup> That parol evidence may be admitted to prove the gift, approved in *Peck v. Vandenberg*, 30 Cal. 55.

death she succeeds as his survivor to an undivided half interest therein as tenant in common with the heirs to whom the other half interest descends, and may as such, where no administrator of the husband's estate has been appointed, maintain ejectment for the entire premises against a mere intruder. *Meeks v. Hahn*, 20 Cal. 620, commented upon and distinguished from the case at bar.

#### APPEAL from the Twelfth Judicial District.

Ejectment to recover certain lands in San Francisco. The plaintiff's title is derived from one Murphy, who was shown to have been in possession of the premises in 1853. July 8th, 1853, Murphy deeded a portion of the land to one Murray, and Oct. 13th, of the same year, the other portion to one Tyler. August 8th, 1853, Murray conveyed to J. D. Stevenson, who on the fifteenth of the same month conveyed to plaintiff, Mary Hart, and Tyler also conveyed to plaintiff, October 24th, 1853. At the time of these conveyances to her the plaintiff was a married woman, her husband living with her in San Francisco. In the deed from Stevenson to plaintiff the motive was stated to be "in consideration of the regard and esteem which he, the said party of the first part, has and bears unto the said party of the second part, and for the furtherance of her well-being and comfort, and also for and in consideration of the sum of five dollars to him in hand paid," etc. Stevenson testified that he was the son-in-law of plaintiff, and also (under the objection of defendant) that the conveyance was a gift, no consideration having actually been paid.

In the deed from Tyler to plaintiff the consideration was stated to be "the sum of one dollar paid to me by [347] Mrs. Mary Hart, the \*receipt whereof I hereby acknowledge, and in consideration of the respect which I have unto the said Mary Hart." Stevenson also testified (under the objections of defendant) that this deed from Tyler was in fact a gift, and that no consideration was paid. Mr. Hart, the husband of plaintiff, died intestate in San Francisco, in 1859, and it was not shown whether any administrator of his estate had ever been appointed, or whether there were any debts requiring an administration.

The plaintiff had judgment in the Court below, and defendant appeals, assigning as error that plaintiff by her deeds acquired no title upon which she can maintain ejectment.

*James McCabe*, for Appellant.

I. The deeds to Mrs. Hart, offered in evidence, are not deeds of gift, but are deeds of bargain and sale; and as she was then the wife of William Hart, all interest thereby conveyed instantly became the common property of the two. (See Act defining the Rights of Husband and Wife, passed April 17th, 1850; *Jackson v. Delancy*, 4 Cow. 427; *Jackson v. Caldwell*, 1 Id. 622; *Jackson v. Sebring*, 16 Johns. 515; *Cheney v. Watkins*, 1 Harris. & J. 527; *Perry v. Price*, 1 Miss. 553.)

II. Parol evidence is inadmissible to prove that a deed which sets out a money consideration was not given for one. (*Hurn v. Soper*, 6 Harris. & J. 276; *Tbulmin v. Austin*, 5 Stewart & P. 410; *Jackson v. McClasney*, 7 Cow. 360; *Church v. Church*, 4 Yeates, 280; 7 Johns. 341; 11 Cowen, 332; 1 Bay, 247; 12 Johns. 77, 427; 4 Day, 395.) It follows, then, that the evidence of Stevenson, showing that no money was paid for those deeds which recite upon their face a money consideration, was nugatory, and those deeds, notwithstanding this attempted attack, yet stand as deeds of bargain and sale and not as deeds of gift, and therefore the interest conveyed (if any) was "common property."

III. The property being common property, it goes to the executor, or administrator, of William Hart, deceased, for the payment of debts, etc., and no action at law or otherwise can be maintained therefor by an heir at law, or devisee, until probate is so far completed that an order of distribution be made by the Probate Court, \*and the [348] record does not show any such order. This is fatal. (See same section, and *Meeks v. Hahn*, 20 Cal. 620.)

*E. Cook*, for Respondent.

FIELD, C. J. delivered the opinion of the Court—COPE, J. concurring.

This is an action to recover the possession of certain real property situated within the city of San Francisco. The plaintiff is the widow of William Hart, late of said city, and claims the premises under two deeds executed to her during her coverture. If those deeds conveyed the premises by way

of gift, she took them as her separate property, and is entitled to maintain the present action without reference to any administration upon her husband's estate. If, on the other hand, the instruments were deeds of bargain and sale, as contended by the appellant, the property belonged to the community existing between herself and husband, and upon his death she succeeded, as his survivor, to one undivided half interest therein, the remaining interest descending to his heirs. As tenant in common with the heirs, she could maintain the present action for the possession of the entire premises against the defendant, who is a mere intruder thereon. One tenant in common is entitled to the possession of the entire tract held in common, against all persons but his cotenants and parties claiming under them, and, as a consequence, can maintain against them an action for its recovery. (*Stark v. Barrett*, 15 Cal. 371; *Touchard v. Crow*, 20 Id. 162.) It does not appear that any administrator was ever appointed upon the estate of William Hart, deceased, or that there were any debts against him which required the appointment of one for their settlement. The right to the possession, therefore, accompanied the title, which vested in the widow and heirs. In *Meeks v. Hahn*, 20 Cal. 620, an administrator had been appointed, and in such case we held that the right to the possession of the real property, of which the intestate died seized, remained exclusively with the administrator until the estate had been settled, or the property had been distributed to the heirs by the decree of the Probate Court.

Judgment affirmed.

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[349] \*CANFIELD *et al.* v. TOBIAS *et al.*

<sup>1</sup> FAILURE TO DENY, EFFECT OF.—An allegation in a complaint, not material to the statement of the plaintiffs' cause of action, is not admitted by a failure on the part of the defendant to deny it in his answer.

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<sup>1</sup> Cited as authority in *Wormouth v. Hatch*, 33 Cal. 128; and see *Moore v. Murdock*, 26 Cal. 515; *Siter v. Jewett*, 33 Cal. 92; *Racouillat v. Rene*, 32 Cal. 450; *Nudd v. Thompson*, 34 Cal. 39; *Jones v. Petaluma*, 36 Cal. 230; *Minor v. Kidder*, Jan. T. 1872 (not reported.)



**IMMATERIAL ALLEGATIONS.**—The only allegations essential to a complaint are those required in stating the cause of action. Allegations inserted for the purpose of intercepting and cutting off an anticipated defense are superfluous and immaterial and do not require an answer.

**ALLEGATIONS ANTICIPATING DEFENSE IMMATERIAL.**—The only object to be gained by a plaintiff in anticipating a defense and replying to it in advance is to put the adverse party upon his oath without making him a witness, and the effect of allowing this would be to establish a system of discovery in conflict with the spirit of the statute.

**IDEM.**—The complaint stated a cause of action for goods sold, and, in addition, with a view to meet a probable defense of payment based upon the giving of certain notes by defendant and a receipt in full by plaintiff, stated the making of the notes and receipt and alleged facts attending the transaction which if true avoided its effect as payment by reason of fraud and misrepresentation on the part of defendant. The answer admitted the original demand and averred payment by the notes referred to in the complaint, but did not deny in proper form the allegations in the complaint respecting the fraud of defendant in the transaction. The case was submitted on the pleadings and plaintiff had judgment: *Held*, that the judgment was erroneous; that the allegations of the complaint in reference to the transaction claimed to operate as payment were not material allegations requiring a denial, and were not therefore admitted by the failure of defendant to deny them.

#### APPEAL from the Twelfth Judicial District.

The facts are stated in the opinion.

*H. J. Labatt*, for Appellant.

*Edward Tompkins*, for Respondent.

COPE, J. delivered the opinion of the Court—FIELD, C. J. and NORTON, J. concurring.

This is an action to recover a balance alleged to be due on an account for goods, wares, and merchandise. The plaintiff obtained a judgment upon the pleadings, and the only question is as to the sufficiency of the answer.

The answer admits that the indebtedness once existed, but avers that certain promissory notes, signed by the defendants and indorsed \*by a third person, were received by the plaintiffs in satisfaction of the debt. It contains a copy of a receipt purporting to have been signed by the plaintiffs, acknowledging that the notes were received in full payment of the amount due, and avers that the notes themselves have been paid. For the purposes of the case, the matters set forth in the answer are to be taken as true, and there is no doubt that these matters, relieved of other con-

siderations, constitute a defense to the action. It is claimed, however, that the answer fails to deny, or denies insufficiently, certain allegations of the complaint charging the defendants with fraud and misrepresentation in procuring the assent of the plaintiffs to the arrangement referred to. The character of the arrangement is fully set forth in the complaint, and the allegations upon the subject were inserted by way of anticipation, and not as a part of the cause of action necessary to be stated in the first instance. They are not, therefore, such allegations as were required in the complaint, and treating the denials in the answer as insufficient to raise an issue upon them, the question occurs as to whether they are to be acted upon as admitted. The statute provides that every material allegation in the complaint, not specifically controverted by the answer, shall be taken as true; and a material allegation is defined to be one which is essential to the claim, and cannot be stricken from the pleading without leaving it insufficient. (Prac. Act, secs. 65, 66.) It would seem from this that an allegation which is not essential to the claim, and which, therefore, is an immaterial one, is not an allegation necessary to be controverted by the answer, in order to avoid the consequence attached to a failure in this respect as to a material allegation. The language used is equivalent to saying, that unless the allegation is essential to the sufficiency of the pleading this consequence is not to follow, for *expressio unius est exclusio alterius* is the rule in such cases. The only allegations essential to a complaint are those required in stating the cause of action, and allegations inserted for the purpose of intercepting and cutting off a defense are superfluous and immaterial. The matter alleged may be material in the case, but immaterial in the complaint, and a plaintiff cannot by pleading such matter at the outset call upon the defendant to answer it. He must plead it at the proper time [351] and \*in pursuance of the rules regulating the course of proceeding, and he cannot anticipate the defense to be made and reply to it in advance. The object of such pleading is to put the adverse party upon his oath without making him a witness, and the effect of allowing it would be to establish a system of discovery in conflict with the spirit of the statute. We are of opinion, therefore, that the alle-

gations in question are not such as the defendants were called upon to answer, and that no inference of their truth is to be drawn from a failure to deny them.

Judgment reversed, and cause remanded.

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### *PIMENTAL et al. v. THE CITY OF SAN FRANCISCO.*

**ORDINANCE OF CITY NULL AND VOID.**—The several cases which have been before this Court in relation to the liability of the city of San Francisco to the parties who bid off the city slip property at the attempted sale by the city authorities in December, 1853, under an alleged ordinance, designated as Ordinance No. 481, commented upon, and held to have decided and settled the following points:

*First*—That the ordinance, so called, was never passed, and was, therefore, a nullity.

*Second*—That the sale made in pursuance of it was, therefore, invalid and passed no title to the bidders.

*Third*—That the bidders were entitled to recover back from the city the purchase money paid by them, and received and appropriated by the city authorities.

*Fourth*—That they were not precluded from a recovery either: 1st, by reason of any want of privity between themselves and the city; or 2d, by the alleged subsequent adoption by the city authorities of the ordinance directing the sale; or 3d, by reason of a subsequent alleged ratification of the sale by an appropriation of the proceeds; or 4th, by the clause in the city charter restraining the corporation from contracting liabilities beyond the sum of \$50,000; or 5th, by the Act of the Legislature of 1853, authorizing the City Treasurer to execute deeds to the purchasers on certain conditions.

**LIMITATION OF ACTION FOR MONEY PAID FOR CITY SLIP PROPERTY.**—Claims against the city of San Francisco by the bidders at the attempted sale in December, 1853, for the purchase money paid on such sale, are within the fourth subdivision of the seventeenth section of the Limitation Act, and are barred by a failure to sue within two years from the date of the receipt of the money by the city.

**COMMENCEMENT OF ACTION, WHAT DEEMED.**—\*The filing of a complaint in the [352] proper Court, without the issuance of a summons thereon, is the commencement of an action within the terms and meaning of the Limitation Act, and stops the running of the statute.

**INVALID SALES OF CITY SLIP PROPERTY.**—The complaint, in an action to recover back from the city of San Francisco purchase money paid upon the invalid sales of her city slip property in 1853, was filed April 21st, 1856, and alleged that one instalment of the purchase money was paid December 27th, 1853, another February 27th, 1854, and a third April 27th, 1854, and that these several payments were received by the city on the respective days of their payment. The referee to whom the case was referred found as a fact, that the several payments were made to the city and accepted by her as alleged in the complaint: *Held*, that the defense of the Statute of Limitations pleaded by the city must be sustained as to the first two instalments, and disallowed as to the third.

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\* Cited as authority in *Satterlee v. San Francisco*, 23 Cal. 818; *Herzo v. San Francisco*, 33 Cal. 140.

\* Cited as authority in *Allen v. Marshall*, 34 Cal. 166.

## APPEAL from the Fourth Judicial District.

This is an action to recover the sum of \$7,900 alleged to have been received from the plaintiff by the city of San Francisco upon an alleged sale of a parcel of certain property, known as the city slip property, situated within the limits of the said city—\$1,975 on the twenty-seventh of December, 1853, \$3,950 on the twenty-seventh of February, 1854, and \$1,975 on the twenty-seventh of April, 1854. The complaint was filed on the twenty-first of April, 1856, and the summons was issued on the twenty-fourth of December, 1860. The facts of the case are sufficiently stated in the opinion of the Court. A more detailed statement of the facts relating to said alleged sale are found in the report of the case of *McCracken v. The City of San Francisco*, 16 Cal. 591, and in the report of the case of *Grogan v. The City of San Francisco*, 18 Id. 590.

In the present case the plaintiff had judgment, and the defendant appeals.

' O. L. Shafter, for Appellant.

The bar of the statute is interposed, in the first place, to the whole claim; and, in the second place, to the first two payments made to and received by the city on the twenty-seventh of December, 1853, and on the twenty-seventh of February, 1854, respectively.

The defense to the whole claim will first be considered. [353] The \*complaint was filed on the twenty-first day of April, 1856—two years from the payment and receipt of the third and last instalment, lacking eight days. The summons was not issued until the twenty-fourth day of December, 1860—four years and about eight months after the filing of the complaint. The statute provision is as follows: "An action shall be deemed to be commenced, within the meaning of this act, when the complaint has been filed in the proper office."

There is nothing in the pleadings, findings, or evidence, furnishing the slightest explanation for the plaintiff's protracted delay in taking out the summons. The delay cannot be attributed to any delinquency of the Clerk. When a com-

plaint is filed, the summons does not go of course. It is not the duty of the Clerk to issue process until it is applied for. The provision of the Practice Act (sec. 22) is as follows: "At any time after the filing of the complaint, the plaintiff may have a summons issued." This is decisive to show that the issuance of the summons is a matter left entirely to the plaintiff's direction. We claim, then, this result: That the unexplained interval of four years and eight months lying between the filing of the complaint in this action and the issuance of the summons was by reason of the plaintiffs' omission to call for it alone; and that such omission was the result of choice on their part, and not of necessity, accident, mistake, or fraud on the part of others. Did the statute give the plaintiffs the right to make this choice thus arbitrarily? Are they relieved of the necessity of making explanations? The answer to be given to these questions depends, to some extent, upon the interpretation of the word "filing," as it is used in the statute

*First*—There are but three views possible, and are as follows:

1. That after the filing of the complaint the summons must issue immediately, and be immediately thereafter delivered to the officer for service. This view is untenable, without doubt.

2. That the filing of the complaint, *ipso facto*, puts the claim of the plaintiff beyond the reach of the statute forever.

3. That the complaint having been filed, the party, within a reasonable time thereafter, must take the next step called for by the routine of procedure, viz.: issuance of summons to the Sheriff.

\*Which of these last two views is the correct one? [354] To the first of the two there is one general objection.

It involves an utter abandonment of the policy with reference to which alone Statutes of Limitations are supposed to have been framed; and, in short, leaves the statute without any efficient or intelligible purpose. If the mere filing of the complaint, of itself, takes a claim out of the Statute of Limitations for all time, then it is a Statute of Limitations only in a very narrow sense. It in no sense limits the accumulation of stale claims, nor does it diminish the possibilities

of individual and social disquiet connected with suits prosecuted to enforce them. The filing of the complaint does not prevent the death of witnesses or their dispersion; it does not lessen the power of time to work a destruction of papers, nor does it furnish any appliance to aid or forestall the proverbial infirmity of human memory. In short, though the statute is a remedial one in theory, yet it remedies nothing in fact; though passed to correct serious mischiefs, it tolerates and nurses the whole brood.

Under this construction, the statute is not and cannot be in its outcomes a "statute of repose." The maxim "*vigilantibus non dormientibus jura subveniunt*" is reversed, and in its relations to every description of claim is made to read "*dormientibus non vigilantibus jura subveniunt*." The maxim of "*interest reipublicæ ut sit finis litium*" loses all its ancient dues; and to sum the whole up in a word, a question of great public concern is virtually withdrawn from the control of law, and submitted for determination to the caprice or interested views of a party.

As opposed to this view of the true intent of the statute, we insist that the filing of the complaint commences the action only *de bene esse*; and if the plaintiff does not use reasonable diligence in the matter of taking the next step, the action must be held, by legal conclusion, not to have been efficiently commenced, or as having been abandoned, or as having been brought in fraud of the policy of repose, upon which the statute proceeds. These are to be regarded as merely different modes of stating a point which is substantially one and the same in legal idea.

As justifying the construction which we claim to be the true one, there are a number of considerations that may be adverted to:

[355] \*I. The doctrine of reasonable diligence pervades the whole body of the law. It approximates universality more nearly than any other single truth in the general canon. It connects itself, in some form, with every right, and with every private and every public duty.

II. By the rule of the common law, a suit was commenced, within the meaning of the Statute of Limitations, by the issuance of a summons, and delivering it or sending it to the

Sheriff, with a *bona fide* intent to have it served. (*Burdick v. Green*, 18 Johns. 14; *Fischer v. Gansevoort*, Id. 496; *Ross v. Luther*, 4 Cow. 161.)

III. The doctrine of reasonable diligence has already been wrought into the texture of the statute by judicial construction. By the common law, the death of a plaintiff abated the suit, and the executor was compelled to commence *de novo*. If a party, having brought his action before the statute had run, died after it had run, the executor was allowed to bring a new action within a reasonable time after the death. Still, the Statute of James, in its letter, hinted at no such right. (*Kinsey v. Heyward*, 1 Lord Raym. 434; *Schermerhorn v. Schermerhorn*, 5 Wend. 513.)

IV. Our Statute of Limitations is fraught with positive recognitions of the rule of reasonable diligence. They are set forth in detail in the twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, and twenty-ninth sections. These sections, and the one relating to the commencement of actions, are all *in pari materia*. It is assumed that they all proceed upon the same policy, and that they are designed to secure a common end by kindred modes and on the basis of kindred ideas. *Noscitur a Sociis*. (*Pudney v. Griffiths et al.*, 15 How. Prac. Rep. 410.)

V. The construction which we resist results in the strange anomaly that the filing of a complaint by the plaintiff is more than the equivalent of a new promise, or of any number of new promises short of infinity, made by the defendant.

VI. The adverse view goes entirely on the literal import of the word "filing," and excludes peremptorily from consideration all the matters hereinbefore adverted to, as being utterly foreign to this contested question of construction. The statute is remedial, and \*literal interpretation [356] is not the rule. "*Qui hæret in litera hæret in cortice*" contains at once a rule and rebuke. Literal interpretation here would, however, be fatal to the respondents—for their complaint was never "strung upon either thread or wire."

But, passing this, the meaning of the word in the minor law and in the rules of Court, and in the dialect of prothonotaries and clerks, is well understood. But here the

word is used in a more important relation, and it is enlarged and ennobled by the more exalted use to which it is put. "In interpreting an act of Parliament it is not in general a true line of construction to decide according to the strict letter of the act; but Courts will rather consider what is the fair meaning, and expound it differently from the letter, in order to preserve the intent. The meaning of particular words, indeed, in Acts of Parliament, as well as in other instruments, is to be found, not so much in strict etymological propriety of language, or even in popular use, as in the subject or occasion in which they are used, and the object that is intended to be attained." (Broom's Maxims, 536.)

*Second*—Assuming, then, that the plaintiffs, having filed their complaint, were obliged to take out a summons in a reasonable time thereafter, and deliver it or send it to the Sheriff, with a *bona fide* intent to have it served, is there any rule by which, on the facts of this case, the law can determine for itself whether the limits of such reasonable time have or have not been transcended by the plaintiffs?

In *Kinsey v. Heyward*, 1 Lord Raymond, 434, his Lordship quaintly remarks: "The law delighteth in a year, as may be instanced in many cases." This delight is manifested in the rule of "continual claim;" in the rule limiting the issuance of executions on judgments to one year from the date of their rendition; in the rule under which tenancies, originally at will, are run into tenancies from year to year. The English Chancery seems also to have been affected with the "delight" in question—for a mortgagor in a foreclosure case was allowed a year in which to redeem.

In *Huntington, Administrator, v. Brinckerhoff*, 10 Wend. 278, the Court say: "Such reasonable time (for an executor to sue) is generally one year after the death of the testator, unless there be special causes to be shown and approved by the Court."

[357] \**Third*—But if the statute should fail as a defense to the whole claim of the respondents, then it is presented to the first two payments—the one being twenty-five per cent. and the other fifty per cent. of the whole amount. The referee finds as matter of fact that the first payment was made twenty-eight months and that the second was made



twenty-six months before the complaint was filed. And it is found that both payments were made to the defendant, and that they were both received by the defendant twenty-eight and twenty-six months respectively anterior to the commencement of the action.

The statute began to run from the moment that the money was had and received by the defendant to the plaintiffs' use. "When a debt is payable at several times—that is, by instalments—the time begins to run from the expiration of the first term, for the part then payable, and for other parts only from the day of the expiration of the respective terms of payment." (Ang. on Lims. 105.)

Where money has been paid by mistake, the statute begins to run from the time when the mistake was committed, not from the time when the mistake was discovered. (Id. 109.)

*W. H. Patterson*, for Respondents.

I. The defendant having received plaintiffs' money without any consideration is to be treated as bailee or depository, and thus the Statute of Limitations does not run, or commence running, until a demand, or until the commencement of the action, which was a demand. (*Phelps v. Bostwick*, 22 Barb. 314, 318; *Brown v. Cook*, 9 Johns. 361; *Beardslee v. Richardson*, 11 Wend. 25; *Edwards on Bailments*, 85, 87.)

II. The position of the appellant as to the construction of the Statute of Limitations is not tenable. He contends that the statute, "an action shall be deemed to be commenced within the meaning of this act when the complaint has been filed in the proper office," should not be read according to its plain provisions, but that the Court should assume the province of the Legislature and add after the word "office" the words "and a summons has been issued with a *bona fide* intent to have it served," or "and the issuance of a summons within a reasonable time thereafter," and insists that *Sharp v. Maguire*, 19 Cal. 577, shall be overruled.

\*This Court has heretofore never assumed the duties [358] of the Legislature, and we hardly think that it will do so for the first time to defeat a just claim by the bar of the Statute of Limitations. In construing the Statute of Limitations, the Supreme Court of New York in *White's Bank of*

*Buffalo v. Ward*, 35 Barb. 643, said: "Without the statute there is no pretense that defendant had any defense. If he seeks to avail himself of the provisions of the Statute of Limitations to relieve himself from liability, he must be subjected to all the conditions therein imposed, one of which, as has been seen, is, that if the action is commenced by the service of the first process upon one of the several defendants jointly indebted, it is to be deemed a sufficient commencement of action to prevent any of the defendants, who may not have been served with process therein until more than six years after the cause of action accrued, from availing themselves of the statute."

It was a maxim of the common law—"a right never dies," and there was therefore no limitation to the time within which an action on contract might be brought. (*Williams v. Jones*, 13 East. 449; *Joynes on Limitations*, 13.) The statute is in derogation of the common law, and hence the rule which has been applied, "that they must be strictly construed." Hence, also, the rule that these statutes operate on the remedy only, and do not extinguish the right itself. (*Williams v. Jones*, 13 East. 439; *Higgins v. Scott*, 1 B. & Adol. 413; *Jones v. Hook*, 2 Rand. 303; *Barney v. Smith*, 4 Harris. & John. 495.)

At the common law, as is claimed by appellant, actions were commenced by the issuance of a *capias* and delivery to the Sheriff, with intent to have it served. But from time immemorial a different rule prevailed in equity, and the filing of the bill (complaint) was a commencement of the action to take the case out of the operation of the statute. (2d ed. Revised Stat. of N. Y. 227; 2 Barb. Ch. Prac. 53; 1 Id. 53; 3 Paige, 204; 7 Id. 197; 24 Wend. 587; 2 Denio, 577.) So in England. (Newland's Ch. Prac. 1, ed. of 1818; 1 Daniel's Ch. Prac. secs. 468, 469.) In this State an uniform rule is established by the Legislature, applicable alike to actions at law and suits in equity.

The filing of a claim in set-off held in Massachusetts [359] to be equiv-<sup>a</sup>alent to the commencement of an action, etc. (*Hunt v. Spalding*, 18 Pick. 521.) In Maryland (10 Gill & Johnson, 326) the running of the Act of Limitations is arrested by the docketing of an action with directions to the Clerk to issue the necessary process, whether such

process is issued or not. "The filing of the bill is the commencement of the action. although the subpoena be not taken out till the limitation has expired." (*Morris v. Ellis*, 7 Jur. 413; *Purell v. Blannerhassett*, 3 J. & L. 24; *Foster v. Thompson*, 2 Con. & L. 568, and note 2; Angell on Limitations, sec. 330; *Henry Miller's Heirs and Devisees v. McIntire*, 6 Pet. 61; *Steindale v. Hawkinson*, 2 Eng. Ch. 393; 1 Simon, 1; McLean, 11; *Christians v. Mitchell*, 3 Iredell's Eq. 542.)

The Legislature having used the word "filing," etc., in a technical sense, the Court should so construe it. (1 Kent's Com. 462; *Clark v. City of Utica*, 18 Barb. 451; Sedgwick on Statutes, 261-263, and cases there cited; 4 Pick. 405; 24 Id. 296.)

FIELD, C. J. delivered the opinion of the Court—COPE, J. and NORTON, J. concurring.

This is one of the numerous cases which have grown out of the attempted sale by the authorities of the city of San Francisco, in December, 1853, of the property known as the City Slip Property. The general facts in all of them upon which the liability of the city is asserted, lie within a narrow compass; but the defenses interposed have varied with the different cases, and have not always been consistent with each other. In some of the cases, the entire transactions giving rise to or connected with the alleged sale, including the receipt and appropriation of the moneys derived therefrom, have been treated as transactions to which the city was an absolute stranger; in other words, a want of privity between the bidders and the city has been asserted; in other of the cases, a subsequent adoption of the ordinance directing the sale has been alleged, and a ratification of the sale by the appropriation of its proceeds. In some the restraining clause of the charter against the incurring of liabilities has been relied upon, and in others, as in the present case, the length of time in which the claim against the city has existed is set up as a bar to its recovery. In the \*meantime [360] the indebtedness against the city, if obligatory at all as such, has been increasing at a rapid rate by the accumulation of interest and the heavy expenses of protracted litigation, until the amount at present exceeds, it is believed,

a million of dollars. It is desirable, therefore, not only for the claimants, but for the city, that the controversy between them should be brought to a termination. It may be well, therefore, before proceeding to consider the question immediately arising in the case at bar, to briefly state the different positions already considered and settled by this Court.

The facts out of which the litigation has arisen are briefly these: On the fifth of December, 1853, the Mayor of San Francisco approved of what purported to be an ordinance passed by the Common Council of the city, providing for the sale of the City Slip Property. This ordinance, so called, in terms authorized and required the Mayor and Joint Committee on Land Claims to sell the property at public auction after certain days advertisement, and provided that twenty-five per cent. of the purchase money should be paid on the day of sale, fifty per cent. in sixty days thereafter, and the balance in four months. At the time this ordinance was acted upon by the Board of Assistant Aldermen, there was a vacancy in the Board, occasioned by the resignation of one of its members, so that of the eight members elected only seven remained in office. Of this number four members voted for the passage of the ordinance, and three against it. As a consequence, the ordinance was not passed, not having received the necessary vote required by the charter then in force. The charter vested the legislative power of the city in a Common Council, consisting of a Board of Aldermen and a Board of Assistant Aldermen, each Board to be composed of eight members, and fixed the limits of their authority. It empowered them to pass all "proper and necessary laws" for the sale of the city property—that is, all proper and necessary ordinances for that purpose, for "laws" and "ordinances," when applied to the acts of municipal corporations, are synonymous terms. But it declared that no ordinance should be passed "unless by a majority of all the members elected to each Board." The ordinance in question, therefore, not having received the vote of a majority of all the mem-

[361] bers elected, was never passed. \*It was, in fact, rejected—as much so as if every member had cast his vote against its passage. It was, therefore, for all purposes

an absolute nullity. The Board, however, declared it passed, and it received, as we have stated, the approval of the Mayor, and was published as a valid ordinance of the city. It is designated in the official book of the city ordinances as Ordinance No. 481. Treating it as a valid ordinance, and assuming to act under its provisions, the Mayor and Land Committee, on the twenty-sixth day of December, 1853, put the property up for sale at auction, and struck it off in parcels to different parties. A portion of the purchase money was paid by the bidders at the time, or within a few days afterward, and another portion, or the entire balance, within the following year. In the present case, the plaintiffs bid off one of the parcels for \$7,900, and paid the first instalment, one-fourth thereof, on the day following the sale; the second instalment, one-half thereof, in February, and the balance in April, 1854. For the amounts paid by the respective bidders, whatever they were, the several actions against the city were brought.

The moneys paid by the bidders went into the treasury of the city, and were afterward by different ordinances and resolutions appropriated to municipal purposes. To the different actions, as we have mentioned, various defenses have been interposed. In some of them, as already stated, the entire transactions giving rise to or connected with the alleged sale have been treated as transactions to which the city was an absolute stranger; in other words, a want of privity, as it is termed, between the bidders and the city has been alleged. This alleged want of privity, as we understand it, amounts to this: that inasmuch as the Mayor and Land Committee had no authority to make the sale, they had no authority to pay the money which they received from the bidders into the treasury of the city, and therefore no obligation can be fastened from such unauthorized act upon the city. The position thus restricted in its statement is undoubtedly correct, but the facts of the cases go beyond this statement. They show an appropriation of the proceeds, and the liability of the city arises from the use of the moneys, or her refusal to refund them after their receipt. The city is not exempted from the common obligation to do justice, which binds \*individuals. Such obligation rests upon all persons, [362]

whether natural or artificial. If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it, from this general obligation. If she obtain other property, which does not belong to her, it is her duty to restore it, or if used, to render an equivalent therefor, from the like obligation. (*Argenti v. San Francisco*, 16 Cal. 282.) The legal liability springs from the moral duty to make restitution. And we do not appreciate the morality which denies in such cases any rights to the individual whose money or other property has been thus appropriated. The law countenances no such wretched ethics; its command always is to do justice.

In the first case which came before this Court—*Holland v. The City of San Francisco*—the doctrine of a want of privity was announced. Had this doctrine prevailed, the purchasers would have lost both the property and their money, while the city would have retained both. This result was so manifestly unjust that a rehearing was granted without hesitation; and on the reargument the position was considered so unsound that it was not noticed by counsel. Mr. Chief Justice Murray, alluding to it, said: "It will hardly be necessary to adduce any argument to establish the proposition that the former opinion of this Court was erroneous. A mere reference to it is sufficient, and the point on which it was predicated seems to have been abandoned by the unanimous consent of the Court and counsel." (7 Cal. 338.)

In some of the actions the subsequent adoption of the ordinance directing the sale of the slip property has been alleged, as a defense, by the city. In *Holland v. San Francisco*, this Court held—Justices Burnett and Terry rendering the decision, Chief Justice Murray dissenting—that an ordinance which was passed within an hour previous to the sale, and which referred to the ordinance directing the sale, and appropriated a portion of its anticipated proceeds, did, in fact, by such reference and appropriation, recognize and adopt the first ordinance, so as to render the subsequent sale valid and binding upon all parties. This decision was overruled in *McCracken v. The City of San Francisco*, as it was too palpably unsound to stand the test of the slightest [363] investiga-tion. Indeed, we have never yet met with

any lawyer who had the hardihood to attempt its justification. The reference in the second ordinance, independent of the appropriation it makes to the previous ordinance, did not add anything to the validity of that ordinance. There is no efficacy in the mere reference to previous legislation, whether valid or invalid. Nor did the appropriation designated in the second ordinance operate as an adoption of the previous ordinance. An ordinance cannot in this way be passed; it can only be passed in one way—by a majority of both Boards of the Common Council voting for it. The doctrine asserted in the decision, as we said in the *McCracken* case, “is unsound in principle and is unsupported by any authority; and could it be maintained, would break down and destroy all the checks imposed by the Legislature upon the exercise of the powers of the Common Council. Upon this doctrine that body could at any time adopt the unauthorized acts of others—in the levy of taxes, in the sale of public property, in the opening of streets, in the infliction of penalties, and by admitting in one ordinance that it had previously passed an ordinance for those purposes, give validity to those acts.”

The subsequent ratification of the sale by the appropriation of its proceeds has also been alleged as a defense. But this appropriation did not operate, as we held in the *McCracken* case, as a ratification any more than the appropriation of moneys received from an illegal assessment would have operated to give validity to such assessment. The ordinances and resolutions making the appropriation did not purport to ratify the sale, but proceeded upon its assumed validity. But in addition to this, as we said in *Grogan v. San Francisco*, 18 Cal. 608, “all sales of the city property were required to be made at public auction. This mode was essential to the validity of any sale. A ratification of an illegal public sale is in effect making a private one. The object of the ratification is to vest in the purchaser the title, as he had acquired none previously, and for that purpose to confirm the sale at the prices already offered—that is, to make a sale upon the consideration of the original bid. At public auction this could not be done, for the very essence of an auction sale is, that every one is at liberty to bid, and that the property shall fall to the highest bidder. It could only be

[364] done by a private arrangement, and as a consequence could not be done at all by the Common Council under the restrictions of the charter. The case would be different if the Common Council had possessed authority to dispose of the municipal property at private sale. They could then have said: We will confirm the previous proceedings; we will take the money already advanced, and what is to be advanced upon the bid as the consideration, and transfer the title. But as the power of disposition could only be exercised in one way—by a direct ordinance authorizing a public sale, after due advertisement of the time, place, and terms—no other mode could be adopted in its stead. Appropriation of the proceeds, proceedings upon the assumed validity of the sale, reference to the ordinance as having been passed, would not answer the requirements of the charter. The Common Council were not invested with any discretion to substitute a different mode for the disposition of the city's property in the place of the one provided."

In some of the actions against the city, the restraining clause of the charter of 1851 against the incurring of debts or liabilities exceeding in the aggregate, with former debts or liabilities, the sum of fifty thousand dollars, has been relied upon. This clause was the subject of extended consideration in the *McCracken* case, and we held that it referred to the acts or contracts of the city, and not to liabilities which the law cast upon her; that it was intended to restrain extravagant expenditures of the public moneys, and not to justify the detention of the property of her citizens, which she had obtained without authority of law. Her liability in this respect, we said, was independent of the restraining clause; "and it may be well doubted," we continued, "whether it would be competent for the Legislature to exempt the city, any more than private individuals, from liability under circumstances of this character. Suppose, for example, that the city should recover judgment against an individual for \$100,000, and collect the money upon execution, and upon appeal, the judgment should be reversed, would it be pretended that the money could not afterwards be recovered? Could the city defend against the claim for restitution upon the pretense that she was already indebted over \$50,000?"



Could she, to use the language of counsel, *owe herself out of liability*? Suppose, again, \*an individual should [365] pay the taxes upon his property, in ignorance that they had already been paid by his agent, could the city retain the amount thus paid by mistake? Could she plead her previous indebtedness as an excuse for the detention of the money to which she had no legal or equitable right? Suppose, again, the city should neglect to keep the streets in repair, and an individual should be injured in consequence—should break his leg, or be otherwise crippled—could she allege her insolvency against his claim for damages? Would her pecuniary condition be an answer for the neglect of every duty, legal and moral? If this were so, she would be the most irresponsible corporation on earth, and her treasury would be, in many instances, but a receptacle for others' property, without possibility of restitution. The truth is, there is no such exemption from liability on her part. The same obligations to do justice rest upon her as rest upon individuals. She cannot appropriate to her own use the property of others, and screen herself from responsibility upon any pretense of excessive indebtedness."

As will be seen from this brief statement of the questions settled in the several cases heretofore before the Court, there is nothing to prevent a recovery of the claimants in the alleged want of privity between the bidders and the city, or in the alleged subsequent adoption of the ordinance providing for the sale, or in the alleged ratification of the sale, or in the restraining clause of the charter. The several cases stand simply upon this ground: The city has obtained the money of her citizens without any consideration, under a mistaken impression of her rights, and has appropriated it to municipal purposes; and they insist, and so we have held, that she is, under these circumstances, bound, both legally and morally, to refund it to them.

The suggestion, frequently made in the cases, that the claimants are taking advantage of a mere technical defect, and that had they remained contented with the sale they would not have been disturbed in their possession, is without force. That defect which vitiates entirely a sale, and leaves the title of the property in the city, can hardly be termed a

technical one. It is a defect which goes to the substance of the whole transaction. Nor is it by any means [366] cer-\*tain that the bidders would have been left in undisturbed possession of the property had no question as to the validity of the alleged sale been raised. They could have no assurance that subsequent corporate authorities might not claim the property; or if the authorities did not move in the matter, that the creditors of the city might not attempt to subject the property to the satisfaction of their demands. But, independently of these considerations, it is enough to say that the bidders had a clear right to ask for a return of their money when they found that the title had not passed to them and could not pass by the proceedings taken. They were not under any obligation to wait a moment. The money was paid for a present not a future transfer of the title. But the bidders were more indulgent than this. It appears from the findings in one of the actions—*Grogan v. San Francisco*, 18 Cal. 597—that in January, 1855, they became aware of the invalidity of the sale, and apprised the then Common Council of the city of its invalidity, and requested them to pass an ordinance ratifying and confirming the sale, which they refused to do. It is true that the Common Council did not possess the power to ratify and confirm the sale, but they could have applied to the Legislature then in session for the power. No steps of the kind were, however, taken. There was only one alternative left to the bidders—to institute suits for the recovery of their money, which they subsequently did. Again, in 1858 the Legislature passed an act authorizing the Treasurer of the city to execute deeds to the purchasers upon receiving the balance, if any remained unpaid, of the original bids; and provided that such deeds should convey the right, title, and interest, both of the city and of the city and county, in the property. But this act the city neglected to accept, and without her acceptance it never acquired any force or efficacy whatever. It undertook to divest the city of her property upon conditions imposed by the Legislature, and not by herself. The conveyances of the Treasurer under the act were, therefore, inoperative to pass any interest, and the title to the property remained as before in the corporation. (*Grogan v. San Francisco*, 18 Cal. 590.)

In the present case, the city sets up as a bar to the plaintiffs' recovery the Statute of Limitations. With the policy of a defense \*of this character on the part of [367] the city we have nothing to do. The defense is a legal one, and our duty ends with a determination whether or not it has been sustained. The action is for the recovery of \$7,900, paid upon the alleged sale of one of the parcels of the slip property. The complaint alleges that \$1,975 were paid on the twenty-seventh of December, 1853; \$3,950 on the twenty-seventh of February, 1854; and the balance, \$1,975, on the twenty-seventh of April, 1854; and that these several sums were received by the city on the respective days of their payment. The referee finds that the several payments were made to the city, and accepted by her as alleged in the complaint. In the other actions, which have been before this Court growing out of the alleged sale, it has appeared that the moneys were in the first instance paid to the Mayor and Land Committee, and by them paid into the treasury of the city, on or about the twenty-eighth of April, 1854. The payment at this date does not appear to have been proved in the present case. The defense is, therefore, sustained as to the first two instalments, and is not sustained as to the third. The complaint was filed on the twenty-first of April, 1856, more than two years after the payment of the first two sums, and within two years after the payment of the last sum. The statute was a bar after two years from the receipt of the moneys by the city. Whether that receipt must be evidenced by a refusal to refund the moneys, or their appropriation to municipal purposes, it is not necessary to express any opinion. The allegation and the finding are both that they were received by the city at the several dates designated.

The position that the filing of the complaint, without the issuance of summons thereon, did not prevent the statute running, is not tenable. At common law there was no limitation to the period within which actions could be commenced, though a presumption was created that the claim was satisfied by the lapse of twenty years. It is the statute which prescribes the limitation; and in this State the same statute declares that an action shall be deemed commenced, within its meaning, "when the complaint has been filed in

the proper Court." It was certainly within the legislative power to affix this qualification upon the provisions [368] of the statute, though \*grave considerations as to its policy may be presented, as they have been by the learned counsel of the appellant in the present case. (*Sharp v. Maguire*, 19 Cal. 597.)

Judgment reversed, and cause remanded for a new trial.

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## THE PEOPLE v. LAWRENCE.

<sup>1</sup> **DYING DECLARATIONS.**—Where, on trial upon an indictment for murder, the dying declarations of the deceased are introduced by the prosecution, it is error to exclude proof offered by defendant of other statements made by the deceased contradicting his dying declarations.

**IDEM—IMPEACHING WITNESS.**—Such proof is admissible under the general rule that the credit of a witness may be impeached by proof that he has made statements contrary to what he has testified, and the condition that the attention of the witness must first have been called to the supposed contradictory statements, is from necessity dispensed with in the case of dying declarations.

<sup>2</sup> **OBJECTION TO INDICTMENT WHEN TO BE TAKEN.**—Where an indictment for murder is returned by the grand jury without being indorsed "a true bill" by the foreman, the objection to it, under the statute, must be made by motion before demurrer or plea, otherwise the defect is waived.

<sup>3</sup> **INDORSEMENT ON INDICTMENT.**—The indorsement upon an indictment is not, in this State, essential to its legality and sufficiency. It is only evidence of the finding of the indictment, and the object of the statute in requiring it is simply to secure the authenticity and genuineness of the instrument. This end is equally attained when the indictment is presented by the grand jury in open Court, and is filed by the Clerk with the other records.

### APPEAL from the Sixteenth Judicial District.

The appellant, William Lawrence, was indicted, with one Crims, for the murder of Constantine Massey, by shooting him with a pistol, and was tried separately and convicted of murder in the first degree. The indictment was indorsed as follows: "In Court of Sessions, Calaveras County, January

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<sup>1</sup> As to dying declarations as evidence, see *People v. Sanchez*, 24 Cal. 17; *People v. Carkhuff*, Id. 640; *People v. Vernon*, 35 Cal. 52.

<sup>2</sup> Cited as authority in *People v. Symonds*, 22 Cal. 354.

<sup>3</sup> Cited as authority in *People v. Blackwell*, 27 Cal. 67; *People v. King*, 28 Cal. 272; *People v. Stacey*, 34 Cal. 308; and see *People v. Lopez*, 26 Cal. 112.

Term, A. D. 1862. *The People v. William Lawrence and John P. Crims.* Indictment for murder. Filed January 10th, 1862. G. F. Wesson, Clerk of Court of Sessions, by A. W. Genung, Deputy. Witnesses, W. A. Kelly, Emerline Lawrence. W. J. Gatewood, District Attorney." After a jury had been empaneled and sworn upon a plea of "not \*guilty," [369] defendant moved to be discharged, on the ground that the indictment was insufficient to support a conviction by reason of its not being indorsed "a true bill" by the foreman of the grand jury. The Court denied the motion and the defendant excepted.

On the trial the prosecution introduced a written statement, purporting to contain the dying declarations of the deceased as to the circumstances of the killing as taken down by his attending physician shortly before his death and some eight days after the shooting; and also, under defendant's objection, proved by a witness, who was present when the writing was made, other declarations of the deceased made at the time in addition to and explanatory of the written statement.

After the evidence for the prosecution had closed the defendant offered to prove that the deceased, after the shooting and at the primary examination of defendant before the committing magistrate, swore to facts directly contradicting his dying declarations. The Court refused to admit the evidence, and the defendant excepted.

The defendant then offered to prove that the deceased had at different times, after the shooting and injury, made declarations contradicting his dying declarations put in evidence. The Court refused to admit said evidence, to which ruling and decision the defendant excepted

*Humphrey Griffith*, for Appellant.

I. The objection to the indictment is, that it is not indorsed "a true bill." This indorsement is the vitality of the bill; without it there can be no indictment. Article five of the Amendments to the Constitution of the United States provides, that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, etc." Article one, section eight, of the Constitution of this State, embodies the same

provision in the same terms. This right of the citizen has never been questioned, and will not be now.

What, then, constitutes "an indictment" by the grand jury. It is a formal charge made by them in their capacity as grand jurors and entered of record, charging the commission of a crime, describing it, upon some person. The grand [370] jury are required to make \*due inquiry into all offenses committed or triable within their county and to find their verdict thereon. The result of that verdict is either "a true bill," or "not a true bill," or "not found;" in either event this indorsement must be made by them and signed by the foreman of the grand jury. This is the evidence of their action, and it is the only evidence authorized by the statute upon any particular case. The argument, then, that the objection should have been taken by motion to set aside the indictment for one of the causes mentioned in section two hundred and seventy-eight, is without force here, for this indictment does not appear to be found at all. A charge appears to have been preferred by the District Attorney, but the action of the grand jury thereon nowhere appears. It will not do, in a case of this magnitude especially, to presume they did a certain thing, for the law says that must be evidenced in a certain way. As well might a judgment of death be sought to be sustained when there is no record of the verdict of a petit jury as an indictment with no record of the verdict of a grand jury. That this is the correct view of the indictment in this case—that in fact there is no indictment found by the grand jury, we refer to *Commonwealth v. Sergeant, Thacher's Crim. Cas.* 116; *Gardiner v. The People*, 3 Scam. 85; *Webster's case*, 5 Greenleaf, 432; 1 Arch. Crim. Prac. & Plead. (Waterman's notes) 98.

II. The Court erred in refusing to permit proof of statements of deceased contradicting his dying declarations. In *People v. Glenn*, 10 Cal. 32, this Court considered at some length the admissibility of dying declarations, holding therein, that while the sense of impending dissolution may compensate for the want of an oath, it can never make up for the want of a cross-examination, and placing the admissibility of the declaration on the sole ground of necessity, at the same time admitting its dangerous and unsatisfactory nature. In

the same case, also, after the introduction of the written statements of the deceased, his oral statements made at a different time were admitted. "The necessity of the case" is held to overrule the right of the defendant to confront his accusers and their witnesses. The necessity of the case admits the dying declarations of the deceased, though made, perchance, by an ignorant, bigoted, prejudiced man.

\*This rule, which is invoked successfully to admit [371] the declarations of deceased, may surely, with equal force and effect, be invoked by the defendant to shield him from the effect of declarations made by a party deceased, which declarations have at other times and in an equally solemn manner been contradicted by the same person. There having been no cross-examination afforded the defendant on the declarations offered by the prosecution, because the necessities of the case did not allow it, the same necessity will dispense with any cross-examination as a foundation for the introduction of contradictory statements.

*Attorney-General, for Respondent.*

FIELD, C. J. delivered the opinion of the Court—COPE, J. and NORTON, J. concurring.

The dying declarations of the deceased were admitted in evidence against the defendant without objection. These declarations relate to the cause of the homicide, and the circumstances attending it. After the prosecution had closed the defendant offered to prove that on his examination before the committing magistrate the deceased had testified to facts directly contradicting his dying declarations; and, also, that he had made other and contradictory declarations. But the Court refused to allow the proof, and its ruling in this respect constitutes one of the errors assigned for a reversal of the judgment.

It does not appear from the record on what ground the Court based its ruling, and we are unable to perceive any which is at all tenable. The rule is general that the credit of a witness may be impeached by proof that he has made statements contrary to what he has testified. There is, it is true, a condition to the application of the rule with reference

to verbal statements; that the attention of the witness must be previously called to the particular occasion and circumstances under which the supposed contradictory statements were made, in order to give him an opportunity of making any explanation of the matter which he may have. (1 Greenleaf's Ev. sec. 462.) But this preliminary condition, it is clear, cannot be complied with where dying declarations are offered in evidence, \*except in very rare cases. Such declarations are generally made to the physician or friends of the deceased, in the absence of the party against whom they are offered, who, of course, has no opportunity of cross-examination, or of directing the attention of the deceased to any alleged contradictory statements made by him. Declarations of this character are received with the greatest caution. They are admissible on the ground of necessity; but, as very justly observed in *People v. Glenn*, 10 Cal. 36, though the condition of the person making the declarations in the last hours of life, under a sense of impending dissolution, may compensate for the want of an oath, it can never make up for the want of a cross-examination. There would be no justice, therefore, in any rule which would deprive the accused, under such circumstances, of the right to impeach the credit of the deceased by proof of his having made contradictory statements as to the homicide and its cause.

The conclusion we have thus reached disposes of the appeal, and necessitates a reversal of the judgment. There is, however, another error assigned, which it is proper to dispose of, inasmuch as the refusal to discharge the prisoner for the alleged illegality and insufficiency of the indictment will otherwise be again presented in the Court below, and, perhaps, upon a second appeal. The indictment was returned to the Court signed by the foreman of the grand jury, but without being indorsed "a true bill," and the absence of this indorsement was urged as a fatal defect to the indictment. The statute requires the indictment to be indorsed "a true bill," and the indorsement to be signed by the foreman, (Crim. Prac. Act, sec. 229,) and provides that the indictment shall be set aside, upon motion of defendant, when not thus indorsed, provided the motion be made before a demurrer or plea is



interposed (Secs. 277, 278;) but if not thus made, that the defendant shall be precluded from afterward taking the objection. (Sec. 280.) In the present case the defendant pleaded to the indictment, and did not raise the objection until after the jury were empaneled and sworn. It was too late then, under the statute, to urge the objection. The indorsement is not essential to the legality and sufficiency of the indictment, as contended. It is only evidence of the finding of the indictment, and the object of the statute in requiring it is simply \*to secure the authenticity [373] and genuineness of the instrument. This end is equally attained when the indictment is presented by the grand jury in open Court, and is filed by the Clerk with other records. If in the present case no indictment had in fact been found, the Court would, undoubtedly, upon a proper application, have allowed the plea to be withdrawn and the motion made. But the truth being that it had been found and presented in open Court, no objection could be urged to it except a technical one.

We are aware that the decisions in England are different; that there the want of the indorsement is fatal to the indictment. The reason is obvious. There the indictment is drawn and presented to the grand jury before any investigation is had upon the accusation. When the investigation is closed, the jury return the result of their deliberations by the indorsement on the indictment: "A true bill," or "Not a true bill," or "Not found." In this State the investigation is had in the first instance upon the complaint, made either by the public prosecutor, or by private persons, or upon the declaration of one of the grand jurors, (Crim. Prac. Act, sec. 213,) and it is only after the jury have come to a conclusion against the party accused that the preparation of an indictment is required from the District Attorney. The conclusion of the jury is evidenced by the presentation to the Court of an indictment, or by a return of the papers from the committing magistrate, if any have been delivered to them, with an indorsement that the charge is dismissed. (Id. sec. 230.) If no papers from the committing magistrate have been in their hands, their judgment upon the complaint is indicated by the fact that no indictment is returned.

In some of our sister States, also, the indorsement "a true bill" is held essential to the validity of the indictment, but the decisions in this respect have arisen from an adherence to the English rule, even after the English practice had gone out of use. (*The State v. Freeman*, 13 N. H. 488; *The State v. Mertens*, 14 Mo. 94.)

Judgment reversed, and cause remanded for a new trial.

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[374] \*McKINNEY *et al.* v. SMITH *et al.*

**DIVERSION OF WATER WHEN NOT AN APPROPRIATION.**—The diversion of the waters of a stream with the object of drainage simply, or without the intention of applying them to some useful purpose, does not constitute an appropriation.

**APPROPRIATION OF WATER LIMITED.**—The taking up of the waters of a stream for a special limited purpose is an appropriation of only so much of the water as is necessary for that particular purpose. The surplus may be the subject of a new appropriation, which will give to the second locator a paramount right to the use of all the waters of the stream not required for the specific purpose of the first appropriation.

<sup>1</sup> **PRIOR RIGHT TO WATER LIMITED.**—Plaintiffs constructed a dam across Clear Creek and dug a ditch for some distance along its bank, by means of which all the waters of the stream were diverted and returned to the creek at a point half a mile below. The object of the diversion was to drain the channel of the stream below the dam and supply water for working a tract of mining claims owned by plaintiffs in the bed of the stream. Subsequently defendants dug a ditch at a point above, through which they diverted the waters of the same stream for general mining purposes. Still later plaintiffs extended their ditch to other mining points and to agricultural land below, and used the water for mining and irrigating at these latter places. In an action by plaintiffs to recover for injuries occasioned by the diversion of defendants to the use of the water at the latter points to which plaintiffs' ditch had been extended: *Held*, that the prior right of plaintiffs was limited to the use of the water for working their original claims in the bed of the stream; that as to the surplus above what was required for that particular purpose, defendants' right was paramount; and that plaintiffs could not recover.

**COPY OF NOTICE OF LOCATION AS EVIDENCE.**—In an action involving the right to and extent of a water privilege claimed by plaintiffs under an alleged appropriation by a number of copartners, defendants, to limit the extent of the appropriation, offered in evidence a paper, purporting to be a copy of the original locating notice of the copartners, and without direct proof of its execution, showed that it was prepared with a knowledge of some of the partners, and was seen as a posted

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<sup>1</sup> Rights of prior appropriation of water limited to the quantity actually required, commented on in *Davis v. Gale*, 32 Cal. 33; and cited as authority in *N. O. & S. O. Co. v. Kidd*, 37 Cal. 318. See 8 Kan. 322.

notice by a portion of them at the point of diversion, and about the time the work was commenced, and that its position was such that it must probably have been seen by all: *Held*, that upon this proof the paper was admissible as part of the *res gestæ*.

**NEW TRIAL, WHEN WILL BE DENIED.**—A new trial will not be ordered because of inaccuracy in the language of a finding of fact when it is sufficiently distinct as to the material question involved in the action.

#### APPEAL from the Fifteenth Judicial District.

This action was originally commenced in the District Court of Shasta County, and before trial was transferred to the District Court of Tehama County, and by consent was tried by the Court without the intervention of a jury.

\*The complaint alleges that the plaintiffs were, in [375] May, 1854, and prior thereto, the owners of a dam across Clear Creek in Shasta County, and of a ditch leading therefrom, and reservoirs connected therewith, constructed for the purpose of diverting and using for mining and agricultural purposes the waters of Clear Creek; that they also own a large tract of agricultural land, situated near the banks of the stream some distance below the dam, to which the ditch leads, and for irrigating which the waters of the stream are necessary; that subsequent to the appropriation of the waters of the stream by plaintiffs, the defendants, by means of a ditch dug by them from a point on Clear Creek some distance above plaintiffs' dam, diverted its waters and used them for mining purposes; that thereby the waters were diminished in quantity, and the portion which was returned to the stream was filled with mud and sediment, unfitting it for plaintiffs' use, and causing, by its deposits, injury to their ditches and reservoirs. For these injuries, damages were claimed in the sum of \$20,000.

The answer denies generally all the allegations of the complaint, and avers a prior appropriation of the waters of the stream by defendants and their grantors, and that they have used the waters only for mining purposes, and returned them into the stream above plaintiffs' dam without any diminution in quality or quantity, except such as necessarily resulted from a careful and judicious use for mining purposes.

The evidence showed that in November, 1853, the plaintiffs built a dam across Clear Creek at the point claimed in the

complaint, and dug a ditch from this point along the bank of the stream to a cross ravine called Slate Gulch emptying into Clear Creek about one half mile below; that the ditch was of sufficient capacity to carry all the waters of the stream at their ordinary stage, and that in the following winter and spring they were all turned into and run through it to the channel of Slate Gulch, and down that channel to the bed of Clear Creek; that the defendants made no appropriation until the autumn of 1854, when they dug a ditch from the stream a number of miles above and diverted the water and used it for mining purposes; that subsequent to the location of defendants' ditch, the plaintiffs extended their ditch some [376] miles below and \*used the water at points along the extension for mining and irrigating.

To show the character and extent of plaintiffs' original appropriation, defendants proved that plaintiffs at the time of the construction of their dam had mining claims in the bed of the stream immediately below, for the working of which it was necessary that the waters of the stream should be diverted, and offered in evidence what purported to be a copy of a notice recorded by plaintiffs in the Recorder's Office of Shasta County, which read as follows:

"Know all men whom it may concern, that we, the undersigned, have taken possession of a section or point on Clear Creek about one-half mile below Briggsville and about two hundred yards above the Norwegian Wheel, with the view and purpose of constructing and building a dam across said creek at said point, with the view of diverting and turning the water out of the bed of said stream at and below the said dam, in order to facilitate the working and the more effectually enabling us to work the bed of said stream below said dam to the extent of four claims, subject to equitable regulations. Nov. 10th, 1853." Signed with the names of the persons who composed the plaintiffs' company and who constructed the dam and ditch. No proof was made that any of plaintiffs' company signed this notice or posted it; but it was shown by witnesses that a notice of the same purport, and to the best of their judgment the original of this copy, was made out and posted at the point where the dam was made about the time the work upon it was commenced; that this notice remained

there for some time and was seen by a number of the members of the company and was in such position that it must probably have been seen by all. To the introduction of this notice the plaintiffs objected, on the ground that the preliminary proof failed to show that plaintiffs executed it or were bound by it. The objection was overruled, and plaintiffs excepted.

The plaintiffs on their part proved that some Norwegians had mining claims below the point where the dam was built and above the Slate Gulch, and that they assisted in constructing the dam and ditch under an agreement that they were to have a certain amount of water from the ditch for the purpose of working their claims, and that after the completion of the ditch to Slate Gulch \*the water from [377] the ditch was used that season by plaintiffs' company and by the Norwegians to wash the dirt in their respective claims.

The District Court found as a fact that the object of plaintiffs in building their original dam and ditch was to dispense with the water of the stream and drain the bed below, where their mining claims were located, and not to appropriate it for mining purposes, and as a conclusion of law, that the plaintiffs were not entitled to the relief sought. Judgment was entered for defendants. Plaintiffs moved for a new trial, which was denied, and from this order and the judgment they now appeal.

*W. H. Rhodes*, for Appellants.

I. The Court erred in receiving in evidence the copy of a notice purporting to have been a copy taken from the Mining Record Book of Shasta County, for the following reasons:

1st. Because the copy of notice admitted was neither the original notice nor a copy taken from the original. The best evidence that the nature of the case admits must be resorted to, and this is the first rule of evidence in all cases. (1 Greenl. Ev., 3d ed., secs. 82, 85.) There is no statute or custom shown that miners' water notices in the district of Shasta must be recorded, in order to give them efficacy, nor any law, written or unwritten, that copies from such records can be read in evidence. The record itself, if the notice be admis-

sible at all, with proof of the recording thereof, would be better evidence than the purported copy therefrom.

2d. Because the original was not proven. The copy even from official records cannot be read until proof of the original is shown. This proof is generally simplified by statutory regulations—as by the authorized acknowledgments of the makers. It is not proven by the evidence in the case that the original notice was ever signed by a single one of the plaintiffs, or by any one through whom they claim.

3d. Because there was no evidence that the plaintiffs or their grantors, or any one or more of them, ever posted, or authorized the posting or publication, of any such notice.

Even if it had been shown that the plaintiffs had in a [378] private room subscribed the \*notice, it would have been ineffectual for any purpose, unless they or some of them had authorized its publication.

4th. Because it was not shown that the defendants ever saw or knew even of the existence of such notice before they commenced their work; hence, they could not have been misled by it, nor can it now be used to the detriment of plaintiffs. (*Duell v. Bear River Co.*, 5 Cal. 84.)

5th. The only purpose for which the notice was used was, in effect, as an estoppel against plaintiffs setting up any title at all to the water under their location in November, 1853. Now, an estoppel must be specially pleaded before it can be introduced into evidence, in order to prevent surprise and fraud. Here no such plea was set up, and therefore it was inadmissible under the pleadings. (*Boggs v. Merced Mining Co.*, 14 Cal. 367; *Hostler v. Hays*, 3 Id. 307.)

6th. But the last and fatal objection to the introduction of this notice is to be found in the character of the notice itself, taken in connection with the proof of the time at which it was signed and posted. It is not a notice setting up a claim to water at all, but simply a regular miner's notice of the claims which those subscribing it intended to work. This was not the act under which the plaintiffs claimed the water, nor even one of them. The notice was simply intended to secure the bed of the creek below the dam for mining purposes. The mining law of this district did not require any notice at all to secure a water privilege. Taking up the point where the dam

was to be built and going to work to build the ditch was all that the law required; and if it required any more, the defendants have not shown that they did any more than this. They gave no notice, except their acts *in pais*.

II. The Court below erred in its conclusion of law, that the plaintiff showed only "an appropriation to dispense with the water and not for use."

The Court bases its whole conclusion upon the notice read in evidence. The doctrine of this Court is this: that a mere notice amounts to nothing. (*Jones v. Jackson*, 9 Cal. 244.) It is the outward acts of parties that manifest their intentions. The intention to appropriate water for mining purposes is best manifested by \*creating a dam and [379] actually building a ditch. (*Conger v. Weaver*, 6 Cal. 558.) Now, the proof in this case is conclusive that the plaintiffs' dam and ditch were in full operation before the initiatory steps of defendants were taken. But the whole evidence should be taken together. In this sense, the acts of a party may be simply words, and these declarations are always admissible in evidence to show intention, if accompanying the acts themselves. (1 Greenl. Ev., 3d ed., secs. 108, 110.)

III. The Court erred in its conclusion that the plaintiffs, having taken the water no further than Slate Gulch before the survey of defendants, could not, therefore, afterwards extend the line of their ditch below or elsewhere just as they pleased. It is not the quantity of water actually used by plaintiffs that determines the extent of their rights, but the size and capacity of their ditches. When a work of this magnitude is projected, it may be that for months or even years much of the water will run to waste or be evaporated in reservoirs before the final result of the speculation can be tested.

Nor does the point of present use affect in any manner the extent of appropriation. This the Supreme Court expressly decided in the very case relied upon by the Court below to sustain one of its positions. (*Maeris v. Bicknell*, 7 Cal. 261.) The Court say: "The next question that arises in this case is, whether a party who makes a prior appropriation of water can change the place of its use without losing that priority

as against those whose rights have attached before the change." The question, we think, can admit of but one answer. It would seem clear that a mere change in the use of water from one mining locality to another by the extension of the ditch or by the construction of branches of the same ditch would by no means affect the prior right of the party. (Id. 263.)

The only real point in controversy here is, and ought to be, would the plaintiffs' ditch at the time of the survey of the defendants carry the whole of the water of Clear Creek?

*A. P. Crittenden*, for Respondent.

I. There was no error in admitting the notice in evidence.

1. It was not necessary for the defendants to prove [380] the execution \*of the notice, but only the fact of its having been posted up by the plaintiffs at their dam or ditch. It was material evidence as a fact indicative and declaratory of the purpose and intention of plaintiffs in constructing their dam and ditch. It makes no difference whether it was printed, or was signed by the plaintiffs or by others for them. It is enough to show that it was adopted by the plaintiffs and published by posting or recording. The question is, did the plaintiffs authorize the publication.

2. It was not necessary for the defendants to show that they had notice of the existence of the notice. The very ground upon which alone plaintiffs' supposed prior right to the water can exist is, that their acts in appropriating it and applying it to use, were open and notorious, and that defendants were bound to know them. The notice to defendants of these acts is presumed in favor of plaintiffs, and is the very foundation of their claim. The posting of the notice is one of the acts to which that presumption applies.

The whole question then is, what was proved by those acts which defendants were bound to know. One of these acts was the posting of the notice.

The plaintiffs say their acts indicated an appropriation of the water for mining purposes. The defendants say they indicated an intention simply to divert the water. Upon this point the notice is significant and indeed conclusive proof.



It gave character to all their other acts which might, otherwise, be construed either way.

The notice was not required to be specifically pleaded as an estoppel. It was one of the acts of plaintiffs connected with the taking of the water, and indicative of the purpose of the taking. It was no more required to be specially pleaded than the fact that the water was taken from Clear Creek by plaintiffs, carried to Slate Gulch, and there turned back into the creek, showing a diversion only, not an appropriation.

II. The Court did not err in any conclusion of law that the plaintiffs showed only "an appropriation to dispense with the water and not for use."

The conclusion of fact drawn by the Court (and this is a conclusion of fact, not of law) did not rest alone on the notice, though that was sufficient, but on the acts of plaintiffs in letting the water flow back into the creek.

\*There is no question in this case about the right [381] of plaintiffs to alter the place of use of the water. It is a question only of the object of the appropriation. The finding is conclusive on that point. If objected to it would be found fully sustained by the evidence, not only by the notice but by the turning of the water back into the creek where it was flowing when Smith's right accrued.

From that fact he was authorized to draw his conclusion and to act upon it, as he did. Any subsequent appropriation of the water by plaintiffs to mining purposes would then be subject to Smith's prior right. The law of this case has been fully settled by this Court. (*Conger v. Weaver*, 6 Cal. 549; *Maeris v. Bicknell*, 7 Id. 261; *Thompson v. Lee*, 8 Id. 275; *Kimball v. Gearhart*, 12 Id. 27; *Ortman v. Dixon*, 13 Id. 33; *Kelly v. Natoma Water Co.*, 6 Id. 105.)

NORTON, J. delivered the opinion of the Court—FIELD, C. J. and COPE, J. concurring.

The appropriation of the water of a stream in order to apply it to some useful purpose secures a right which cannot be infringed upon by a subsequent appropriation of the water by others. But in the case of *Maeris v. Bicknell*, 7 Cal. 261, it was decided that diverting the water from its natural channel for the purpose of drainage simply is not an appro-

priation of the water. And in the case of *Oriman v. Dixon*, 13 Cal. 33, it was decided that the taking up of the water of a stream for a particular purpose—to wit: to run a mill—was an appropriation of only so much of the water as was necessary for that purpose, and did not secure a right to all the water at that point, if there was more than enough for that purpose, and that a person so appropriating the water for the special purpose could not afterwards appropriate the surplus to the detriment of other persons who had in the *interim* appropriated that surplus.

In this case the plaintiffs and those under whom they claim built a dam across Clear Creek and by means of a ditch conducted all the water of the stream into Slate Gulch, through which, as a natural channel, it flowed back into Clear Creek at a point some distance below the dam. After their [382] works were completed they \*worked the bed of Clear Creek below the dam and above the mouth of Slate Gulch for mining purposes. Soon after the water was thus conducted into Slate Gulch, the defendants commenced a dam and ditches on Clear Creek, by means of which they appropriated the water for mining purposes at a point many miles above the plaintiff's dam. After this the plaintiffs, by means of flumes and ditches, conducted the water from the point where it was first discharged into Slate Gulch across that gulch, and appropriated it to the use of mining and irrigating at points below Slate Gulch. The Court below found as a fact, that the turning the water from Clear Creek into Slate Gulch was a diversion to dispense with the water and not a diversion for appropriation. And as a conclusion of law, the Court decided that "defendants being the prior locators were entitled to the use of the water, and that plaintiffs cannot maintain an action for damages for the causes set forth in the complaint." The plaintiffs moved for a new trial, on the ground that the evidence was insufficient to justify the finding of facts upon which this conclusion is founded. The fact found upon which this conclusion rests is, that the turning of the water by the plaintiffs into Slate Gulch was a diversion to dispense with it and not to appropriate it.

The grievance stated in the complaint is the injury caused to the plaintiffs in their use of the water for mining and

irrigating purposes below Slate Gulch. It does not appear in the complaint, nor is it urged on the argument, that the use of the water by the defendants has interfered with any use of the water by the plaintiffs at any point between their dam and Slate Gulch. Between these points the evidence shows and the Court finds that some use of the water by the Norwegians for mining purposes was made before the defendants began their works, and it was proved, also, that the water from the ditch was used to work the bed of the creek. The use of the water by the Norwegians to be taken from the ditch was provided for at the inception of the project, and its actual use by them and its use in working the bed of the creek, is conclusive that the water was in fact appropriated for use between the dam and Slate Gulch before the defendants' right accrued. The notice posted by the plaintiffs is, however, very explicit that their purpose in taking possession of the section or point on the creek was to build a dam \* "with the view of diverting and turning the [383] water out of the bed of said stream at and below said dam, in order to facilitate the working and the more effectually enabling (them) to work the bed of said stream below said dam to the extent of four claims, subject to equitable regulations." It is not necessary to decide whether the terms of this notice are such as would estop the plaintiffs from claiming a right, as against subsequent appropriators, to the use of the water in their ditch so far as it was necessary to work the bed of the creek to the extent of four claims, because we think this notice, as well as all the other facts proved, establishes that at most the water was appropriated for a special and limited purpose—to wit, the working of the bed and banks of the creek below the dam to the extent of four claims, or at the farthest to the mouth of Slate Gulch—and that hence, the Court below, under the rule cited from the case of *Ortman v. Dixon*, rightly decided that this action could not be maintained for damages for the causes set forth in the complaint, which were, as we have seen, for injury to the use of the water below Slate Gulch.

We are aware that in the case of *Maeris v. Bicknell* it was decided that a party who makes an appropriation of water can change the place of its use, as by an extension of the

ditch, without losing his priority as against those whose rights have attached before the change, but the Court expressly reserved the expression of any opinion whether a party could change the use of the water from one purpose to another without losing his priority. In this case there was no general appropriation of the water by the plaintiffs before the defendants' rights attached. The direct object of their works was to drain the bed of Clear Creek at a certain point, and the ditch was necessarily of sufficient capacity to carry all the water in order to effect that object, and they may have had a prior right to the use of sufficient water to work the bed of the creek at that locality without thereby securing a prior right to all the water of the creek, to be used in some distinct and separate undertaking at any indefinite future period, in the same manner as a sufficient quantity might have been appropriated to run a mill without securing a right to the surplus to be afterwards applied to mining purposes.

[384] There may be difficulty in many cases in determining that \*the appropriation was limited to a special purpose or to a particular locality. Each case must be decided upon its peculiar facts. In this case the limited character of the right is distinct and clear, and it would be a serious restriction upon the valuable use of the means of carrying on mining in this State if an appropriation of the limited character proved in this case, assuming that there was such an appropriation, could have the effect to withdraw all the waters of such a creek from all other use for an indefinite period. On the facts, as they existed when the defendants began their works, they had the right to appropriate the water to any use that would not interfere with the plaintiffs' use of it for the special purpose to which they had then appropriated it.

No *express* distinction is made by the plaintiffs in their complaint or by the Court in its finding between the right of the plaintiffs to the use of so much water as might be necessary to work the bed of Clear Creek above Slate Gulch and their right to use the water for mining or irrigating purposes below Slate Gulch. But the plaintiffs allege that by their ditch they conducted the water on to mining grounds two miles below the dam, and the diagram shows the agricultural

land to be still farther below. It is for injury to the right to use the water at these localities that the complaint seeks redress. Slate Gulch is only half a mile below the dam. In its finding the Court says: "No survey was made for a ditch below Slate Gulch at that time (November, 1853) and for some time after, nor was any notice given, or tree blazed, or stakes set to mark such line. The water was discharged from their ditch into Slate Gulch, and through the natural channel of Slate Gulch found its way back to Clear Creek *below the mining claims* and notice of plaintiffs. This was clearly a diversion to dispense with the water and not a diversion for appropriation." And the conclusion of law, which is the matter particularly specified as the ground for asking a new trial, is, as before stated, that the "plaintiffs cannot maintain an action for damages *for the causes set forth in the complaint.*" It is clear that the question which was litigated by the parties and considered by the Court was, whether the plaintiffs had appropriated *all* the water of Clear Creek at the time they diverted it and discharged the bulk of it into Slate Gulch; and the finding of the Court is, in \*substance, [385] that they had not appropriated that portion which was discharged into Slate Gulch, and in reference to which this action was brought. It is not requisite to order a new trial for the purpose of having the language of the finding made more exact, when it is sufficiently distinct as to the subject matter of the action.

The proof was sufficient to authorize the notice to be given in evidence as a part of the *res gesta*.

It was shown to have been prepared with the knowledge of some of the copartners, and seen by them as a posted notice; and that it was so posted as that, in the language of one of the witnesses, it "must have been seen" by the others.

We think the case was properly decided, and that the judgment should be affirmed.

## THE PEOPLE v. BECK.

**INDICTMENT FOR ROBBERY.**—An indictment for robbery must state that the property was taken from the person of another. If it merely state that it was taken from "another person," it is fatally defective.

**APPEAL** from the Court of Sessions of Placer County.

Indictment for robbery. The language of the indictment as to the taking of the property is, "did feloniously, forcibly, violently, unlawfully, and with force and arms, and by force, threats, and intimidation, take from another, to wit, from one John Hornsyer, a leather bag and purse," etc.

Defendant demurred, because the indictment failed to show that the property was taken from the person of another. The demurrer was overruled, and defendant subsequently tried and convicted, and he now appeals.

*James Anderson*, for Appellant.

To the point that the indictment was insufficient, cited sec. 59 of Act concerning Crimes and Punishments; Wharton's Criminal Law, 632; 11 Humph. 167.

*Attorney-General*, for Respondent.

[386] \*FIELD, C. J. delivered the opinion of the Court—  
COPE, J. concurring.

The indictment in this case is fatally defective in the statement of the facts constituting the offense charged. Robbery is defined by the statute to be "the felonious and violent taking of money, goods, or other valuable thing from *the person* of another by force or intimidation." The indictment does not allege the taking in the present case from the person of another, but only from another person, which is quite a different thing. The demurrer should have been sustained.

Judgment reversed, and cause remanded.

## BROWN v. CRONISE.

<sup>1</sup> **PAYMENT BY BILL OF EXCHANGE.**—Where a creditor receives, on account of his debt, a bill of exchange drawn in his favor by the debtor upon a third person, it operates but as a conditional payment; if, however, the creditor fails to present it to the drawee for acceptance or payment as required by the rules of commercial law, it becomes thereby an actual charge against him, and operates *pro tanto* as a satisfaction of his demand.

## APPEAL from the Seventh Judicial District.

This action was commenced October 23d, 1861, by R. S. Brown, to recover a balance of three hundred and sixty-one dollars alleged to be due from defendant, T. F. Cronise, for wood sold and delivered to him by plaintiff.

The answer, among other matters of defense, claims a credit of two hundred dollars, on account of a bill of exchange drawn for that amount in favor of plaintiff by defendant on W. H. Cronise in San Francisco. This bill was dated October 15th, 1861, and requested W. H. Cronise to pay plaintiff two hundred dollars on the twenty-third of that month. It was never presented to the drawee, either for acceptance or payment, but sometime in November, after the action was commenced, plaintiff offered to return it to defendant, who refused to receive it.

\*The Court below allowed the amount of the bill [387] as a payment on plaintiff's demand, and gave him judgment for the balance. From this judgment plaintiff appeals.

*W. H. Patterson*, for Appellant, cited *Clark v. Young*, 1 Cranch, 181; *Tobey v. Barber*, 5 Johns. 68; *Holmes v. De Camp*, 1 Id. 34; *Burdick v. Green*, 15 Id. 247; 8 Com. 472; *Griffith v. Grogan*, 12 Cal. 317; *Higgins v. Wortell*, 18 Id. 330.

*J. M. Seawell*, for Respondent.

When a debtor gives to his creditor a bill or note on which such debtor is liable as drawer or indorser, the future relations of the parties are to be determined by the laws which regulate bills of exchange and promissory notes. I am aware

<sup>1</sup> See *Welch v. Allington*, 23 Cal. 322; *Mitchell v. Hackett*, Oct. T. 1863 (not reported.)

that there are cases, such as *Tobey v. Barber*, 5 Johns. 68, and *Griffith v. Grogan*, 12 Cal. 317, which decide that unless the note is received by express agreement as payment, it does not extinguish the debt. But in these cases the note was the note of a third party, and the defendants were not liable as indorsers or drawers thereof. Where a debtor becomes liable on a negotiable instrument as a drawer or indorser, it is unnecessary and unjust that he should continue to be liable on the original indebtedness. But in this case the defendant was the drawer of the bill. The law presumes that he had funds in the hands of the drawer, and that he was prejudiced by the neglect of the holder to present the bill for acceptance and payment, and to give notice of non-acceptance and non-payment to the drawer. The uncontradicted averments of the answer establish the fact that the bill was not presented either for acceptance or payment by the plaintiff or any other person. The plaintiff has not attempted to excuse his conduct by any evidence, and the law declares by a rule as inexorable as the laws of nature that the drawer is discharged.

"The receipt of a bill," says Judge Story, "implies an undertaking on the part of the indorser, receiver, or other holder, to every other party to the bill, who would be bound to pay it, and would be entitled to bring an action on [388] paying it, to present it in \*proper time, when necessary, for acceptance, and at maturity for payment—  
\* \* \* to give notice without delay to every such party of a failure in the attempt to procure acceptance or payment, and to take all the proper steps (such as making a protest) and do all the proper acts required by law, upon such dishonor, to verify and establish the same. A default in any of these respects will discharge the party in respect to whom there has been any such default, and who would be bound to pay the same, from all responsibility on account of the non-acceptance, or non-payment of the bill, and will operate as a satisfaction of any debt, or demand for which it was given." (Story on Bills, secs. 113, 227, 303, 304, 344, 376, 393, 419; Bailey on Bills, chap. 7, sec. 1, p. 217, 5th ed.; Id. sec. 2, p. 286; Chitty on Bills, chap. 10, pp. 476, 467, 468.)

None of the positions assumed by respondent conflict with



the late case of *Higgins v. Wortell*, 18 Cal. 330, which decides that a note given by a debtor to his creditor operates only to extend the time of payment, and that on the failure of the debtor to pay the note, a right of action accrues on the original indebtedness as well as on the note. In that case the defendants were the makers of the note, and could not be prejudiced by a failure to make demand or to give notice. Here the defendant is the drawer of a bill, and his rights and responsibilities are in all material respects the same as those of the indorser of a note.

COPE, J. delivered the opinion of the Court—NORTON, J. concurring.

The defendant, being indebted to the plaintiff, drew a bill of exchange in his favor upon a third person for a part of the amount. The bill was drawn on the fifteenth of October, 1861, and was payable on the twenty-third of the same month, but has not been presented for payment. The plaintiff sues upon the original indebtedness, and the defendant relies upon the bill as a discharge *pro tanto*.

The receipt of a note or bill on account of a preëxisting indebtedness does not, *per se*, extinguish the debt. It operates, however, as a conditional payment; and if the payee of a bill so conduct himself as to release the drawer from liability upon it, he cannot maintain an action for the debt. Story, in his work on Bills, after \*stating the [389] obligations resting upon the holder in regard to presentment, says: "A default in any of these respects will discharge the party in respect to whom there has been such default and who otherwise would be bound to pay the same, from all responsibility on account of the non-acceptance or non-payment of the bill, and will operate as a satisfaction of any debt or demand for which it was given." (Story on Bills, sec. 112.) The authorities cited by the appellant are to the effect that receiving the bill does not of itself extinguish the debt; which, of course, is a very different question from the one presented here. The plaintiff offers no excuse for his failure to present the bill, and, so far as it goes, the defendant is entitled to the benefit of it in discharge of the debt.

Judgment affirmed

VIDEAU v. GRIFFIN *et al.*

**CONVEYANCE BY ATTORNEY—AUTHORITY MUST BE IN WRITING.**—The authority of an attorney to execute for his principal a conveyance of real estate must be in writing, and a deed purporting to have been executed by an attorney is inadmissible in evidence without proof being first made of the attorney's written authority.

**IDEM—PAROL ACKNOWLEDGMENT WILL NOT RENDER VALID.**—When a deed has been executed by an attorney without any previous written authority, no subsequent parol acknowledgment of his authority by the principal will make the conveyance valid.

**IDEM—EXCEPTION TO RULE.**—The only exception to the rule that an authority to execute a deed must be conferred by writing, is when the execution by the attorney is in the presence of the principal, and to bring a case within this exception it is not sufficient that the attorney was directed to sign the name of the principal and affix his seal, but the execution must have been in his immediate presence, and under his immediate direction.

**IDEM—EXECUTION NOT INFERRED.**—The fact that the execution was in the presence of the principal must be affirmatively established by the party who relies upon it as an excuse for the absence of a power in writing, and it is not to be inferred from any coincidence between the date of the deed and an acknowledgment of the principal that it was executed by his attorney.

**APPEAL from the Tenth Judicial District.**

Ejectment for a lot in the city of Marysville. Both parties claimed title from John A. Clark, admitted to have been the owner in fee of the premises in 1850. Plaintiff [390] claimed by a deed executed by Clark to him in 1861, conveying the lot for the nominal consideration of one dollar. Defendant claimed under a deed from Clark, purporting to have been executed by attorney in June, 1850, the form of the execution of which deed and the certificate of acknowledgment are set forth in the opinion of the Court.

This deed was offered in evidence by defendant without any preliminary proof of its execution, or of the authority of Sparks, the attorney mentioned, to act for the grantor. On plaintiff's objection, the deed was excluded, and defendant excepted. Plaintiff had judgment, and defendant appeals, assigning as error the exclusion of the conveyance.

*Belcher & Belcher*, for Appellants.

The Court below erred in excluding the deed from Clark to Hibberd. No power of attorney was necessary. Clark acknowledged the deed, and thereby adopted the signing by Sparks. This is often done when the grantor, from sickness

or other cause, is unable to write his name. In such case it is quite immaterial whether he make his mark in the usual way, or employ some one to write his name, as on this deed. In either case, it is the grantor's signature. (Story on Agency, sec. 51; *Ingoldsby v. Juan*, 12 Cal. 578.)

That Clark did acknowledge it himself is clear from the certificate of the notary, which, in the absence of all testimony to the contrary, must be taken as conclusively true. The language admits of no other construction.

*Charles DeLong*, for Respondent, cited *Hanford v. McNair*, 9 Wend. 54; *Smith v. Dickerson*, 6 Humph. 261; and section six of the Act concerning Fraudulent Conveyances and Contracts, passed April 19th, 1850.

FIELD, C. J. delivered the opinion of the Court—NORTON, J. and COPE, J. concurring.

The deed to Hibberd purports to be executed on the first of June, 1850, by "John A. Clark, by his attorney, Henry Sparks." The certificate of acknowledgment annexed is as follows:

\*"CALIFORNIA, SAN FRANCISCO, ss: On this first day [391] of June, in the year of our Lord one thousand eight hundred and fifty, personally appeared before me, John A. Clark, to me known, and who executed the within deed, and acknowledged the same to be his free act and deed, by his attorney, Henry Sparks.

"Given under my hand and seal, the day and year last above written.

THOMAS TILDEN,

"Notary Public."

No power of attorney from Clark to Sparks was produced. The plaintiff relied entirely upon the certificate of the notary to establish the due execution of the deed. Upon the objection of the plaintiff, the Court refused to allow the instrument to be read in evidence, and its ruling in this respect constitutes the ground upon which a reversal of the judgment is sought.

There was no error in the ruling of the Court. The certificate of the notary is only to the effect that Clark acknowl-

edged that he had executed the deed by his attorney, which, in other words, is this: that Clark acknowledged that his attorney had executed the deed. A certificate to this purport does not prove the due execution of the deed by Clark. The Statute of Frauds declares that "No estate or interest in lands, other than for leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by *his lawful agent thereunto authorized by writing.*" Here there was no evidence that Sparks ever had any authority in writing to execute the deed. The certificate of the notary does not show the existence of any such authority in writing, or the acknowledgment of the existence of any. If such authority in fact existed, it should have been produced. In the absence of its production the presumption is that it did not exist. Whatever authority, therefore, the attorney possessed upon the subject, we must regard as having been conferred by parol; and in the face of the statute it is hardly necessary to add that an authority of this nature is insufficient for the transfer of real property.

[392] And a subsequent parol \*acknowledgment of the authority does not, of course, remove its insufficiency. (*Hanford v. McNair*, 9 Wend. 54.)

The only exception to the rule that an authority to execute a deed must be conferred by writing, is where the execution by the attorney is in the presence of the principal. The exception arises from the doctrine that what one does in the presence of and by the direction of another is the act of the latter—as much so as if it were done by himself in person. The attorney in such case, so far as the signature to the instrument is concerned, is a mere amanuensis of the grantor, and in the affixing of the seal is only the instrument, the hand, as it were, of the grantor. It is not sufficient that the attorney was directed to sign the name of the principal and affix his seal; the execution must be in the immediate presence of the principal, and this fact must be affirmatively established by the party who relies upon it as an excuse for the absence

of a power in writing. It is not a fact to be inferred from any coincidence between the date of the deed and the acknowledgment of the principal that it was executed by his attorney, as contended by the learned counsel of the appellants. (*Kline v. Brooks*, 9 Iredell, 219; *Mackay v. Bloodgood*, 9 Johns. 285.)

Judgment affirmed.

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### GROSS v. FOWLER.

<sup>1</sup> "MONTHS" DEFINED.—The term "months" used in the statute fixing the period of redemption from judicial sales means calendar and not lunar months.

STATUTES, DEFINITION OF TERMS.—When a term, not technical, is used in a statute it must, unless the Legislature have affixed to it a special definition, be taken in its ordinary and general sense.

<sup>2</sup> SHERIFF'S DEED, WHEN VOID.—A Sheriff's deed upon a judicial sale, executed before the expiration of the statutory period of redemption, is absolutely void and not merely voidable.

#### APPEAL from the Fifth Judicial District.

Ejectment for a lot in the city of Stockton. The answer denied the plaintiff's title, and the issue thus raised was tried by the Court without a jury.

\*The plaintiff introduced the judgment roll in a [393] former action in the same Court brought by the present plaintiff against the defendant to foreclose a mortgage previously executed by the latter upon the lot in question, in which action a decree was rendered foreclosing the mortgage and directing a sale of the premises; also, the order of sale to the Sheriff and his return certifying that the sale was made on the fifth day of October, 1861, the plaintiff being the purchaser, and a deed from the Sheriff to the plaintiff, dated on the twenty-fifth day of March, 1862.

No evidence was introduced by defendant, and the Court gave judgment for plaintiff.

Defendant moved for a new trial, on the ground that the

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<sup>1</sup> See *Sprague v. Norway*, 31 Cal. 173; *S. & L. Society v. Thompson*, 32 Cal. 347.

<sup>2</sup> Cited as authority in *Bernal v. Glenn*, 33 Cal. 675; *Moore v. Martin*, 38 Cal. 438; *Hogan v. Winslow*, 45 Cal. 588; *Perham v. Kuper*, 61 Cal. 332. See 2 Wall. 190.

evidence was insufficient to justify the decision, which motion was denied. From this order and from the judgment defendant appeals.

*W. J. Graves*, for Appellant.

I. By the words "six months," as used in the Redemption Statute, is meant six calendar not six lunar months. Perhaps in England, ordinarily, the word month, *ex vi termini*, means a lunar month, but in mercantile contracts, even there, the usage or rule is to calculate the months as calendar. (*Jolly v. Young*, 1 Esp. N. P. Cases, 186.) And in other contracts the lunar is made to yield to the calendar months, if such was the intention of the parties. (*Dyke v. Sweeting*, Willis, 585; *Long v. Gale*, 1 Maule & Sedw. 111.)

In this country the old English rule has been considerably impaired if not entirely overthrown, and the term "month" is usually computed, and especially in statutes and judicial proceedings, as calendar. (*Commonwealth v. Chambre*, 4 Dallas, 132; 3 Serg. & Rawle, 184; *Alston v. Alston*, 2 Comst. 604; 5 Grattan, 285; 21 Ala. 47.)

In some of the States the meaning of the term "month" is fixed by statute, but such is not the case in California, and we rest the case upon the law on the subject as changed by the current of American cases, and the manifest intention of the Legislature as gathered from the wording of the section in question.

By the custom of trade, as in case of bills of exchange and \*promissory notes, a month is deemed a calendar month. This, indeed, is the universal rule of the commercial world in regard not only to negotiable instruments but all commercial contracts. (Story on Bills, sec. 330; 3 Brod. & B. 187.)

This is, also, the generally received and popular meaning of the term, and in construing a statute designed to be understood and applied by the people in their business affairs the popular meaning of its terms should be adopted. (*Brewer v. Harris*, 5 Grattan, 298.)

II. The Sheriff's deed having been made within the six months carried no title. It was not merely voidable, but absolutely void. A title deduced by and through a judicial sale

must show a strict compliance with the statutory mode. The statute directs the Sheriff to make the deed after the lapse of six months; he cannot do it before. Were he permitted to do so before, the practice would become general, and thus the title to property sold would become clouded with premature conveyances.

*H. O. Beatty, for Respondent.*

I. Upon the first point of the appellant, whether the term "months" in our Redemption Statute means calendar or lunar months, we ask that the statute making the common law the rule of decision in our State may be considered and applied. In other words, we desire the point to be settled by the common law of England and by no other law. And in support of the position that "months" in our statute mean lunar months, we cite the following authorities: 2 Blackstone's Com. top p. 113 and note; 6 Term. 224; *Stackhouse v. Halsey*, 3 John. Ch. 74—directly in point; *Loring v. Halling*, 15 Id. 119; 3 East. 407; *Croke v. McTavish*, 1 Bingham, 307—found in 8 Eng. Com. Law, 521, 522.

II. Upon the second point, that the deed being prematurely made is only voidable and not absolutely void, we think that the statute itself is conclusive. The conclusion of the two hundred and thirty-third section of the Practice Act reads thus: "If the debtor redeem at any time before the time of redemption expires the effect of the sale shall be terminated and he be restored to his estate." Now, whether a deed be or be not made, if he offer to \*re- [395] deem in time he will be restored to his estate. If he do not redeem in time he will not be restored to his estate whether a deed be or be not made. It is a matter of perfect indifference to him. It does not affect his interests or his right, one way or the other, to be restored to his estate. It would, then, be a new thing to declare a deed absolutely void which worked no injury to any one.

FIELD, C. J. delivered the opinion of the Court—COPE, J. and NORTON, J. concurring.

The plaintiff derails title through a deed of the Sheriff executed to him upon a sale of the premises in controversy

under a decree in a mortgage case. The sale was made on the fifth of October, 1861, and the deed was executed on the twenty-fifth of March following—which was after the lapse of six lunar months, but within six calendar months. The statute allows six months from the date of the sale for the redemption of real property sold under execution, and this Court has held that a similar right of redemption applies to sales under decrees in mortgage cases. The decision placing sales under decrees in mortgage cases and under executions on judgments at law upon the same footing was made as early as 1852, and has been adhered to ever since. (*Kent v. Laffan*, 2 Cal. 595; *McMillan v. Richards*, Id. 412.) It is very generally conceded by the profession that the decision was based upon an erroneous construction of the statute; but, admitting this to be true, it is too late to interfere with it: rights of property of vast value have grown up under the decision which no Court is at liberty at this day to disturb. If a different rule is to be established hereafter, it must be by legislative enactment. Such being the case, two questions are presented for determination: *first*, whether the term “months” in the statute is to be construed to mean lunar or calendar months; and *second*, if construed to mean calendar months, whether the deed of the Sheriff was void or merely voidable.

1. We were under the impression on the argument that the meaning of the term “months,” when used in the Acts of the Legislature and in public documents, had been settled by statute, but we have been unable to find any legislative provision on the subject, and counsel have not called our [396] attention to any, if any exist. We \*must construe it, therefore, as we would any other term which the Legislature has used, and to which it has not affixed a special definition. It is not a technical term, and it must, therefore, be taken in its ordinary and general sense. This is a settled rule of construction, and under it the question presented becomes one of easy solution. In the general and popular use of the term, calendar months are always intended; and “the popular meaning of a term used in a statute, made to be understood and practiced upon by the people,” says the Supreme Court of Connecticut, “is the only intendment that ought to be adopted.” And it is upon this principle, the Court con-



tinues, that the "word 'month' has invariably been expounded to mean calendar month; that is, to mean what every one, not a lawyer by profession, believes the word to mean." (*Strong v. Birchard*, 5 Conn. 361.) A similar view is taken by the Court of Appeals of Virginia, in *Brewer v. Harris*, 5 Grattan, 298: "In the use of language not technical," says the Court, "the Legislature must be supposed to express their meaning according to the sense in which it will be understood by the persons for whom they legislate." (See, also, *Avery v. Pixley*, 4 Mass. 460; *Kimball v. Lamson*, 2 Verm. 138; *Commonwealth v. Chambre*, 4 Dall. 143; *Bartol v. Calvert, Administrator*, 21 Ala. 46.) The reasons upon which the doctrine prevailing in England rests, where, in the absence of any designation, the term "months" in statutes is generally construed to mean lunar and not calendar months, are insufficient to overcome the considerations we have stated.

2. The deed having been executed before the expiration of the statutory period allowed for redemption, the question arises, whether it is void or only voidable. The plaintiff contends that it is only voidable—by which he means, as we suppose, that it is good until set aside by direct application to the Court, and that it cannot be attacked collaterally. If this be his meaning, the position is untenable. The real question is one of power. Had the Sheriff authority to execute the deed at the time? And to this there can be but one answer: his power did not arise until the six months had elapsed.

Judgment reversed, and cause remanded for a new trial.

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\*GUY v. HANLY *et al.*

[397]

**NEW TRIAL, WHEN WILL BE DENIED.**—A new trial will not be granted on the ground of surprise at the introduction of false evidence when the evidence related solely to a point not necessarily involved in the decision of the action and which in fact had no influence upon the judgment.

**IDEM.**—False testimony given by mistake or otherwise is sufficient to avoid a verdict or decision based upon it, if ordinary prudence has been observed by the losing party.

**DEFENSES TO PART OF COMPLAINT AND DISCLAIMER.**—If the defendant in ejectment desires to defend for only a portion of the premises, and to limit his liability for mesne profits in a corresponding proportion, he must frame his answer accordingly and specify the portion of the premises for which it is intended to defend and disclaim as to the balance.

**IDEM.**—To a complaint in ejectment for a fifty vara lot, the answer admitted the possession of defendants to the extent of one-third, "more or less," and the witnesses who testified upon the subject stated that they (defendants) were "on the lot—a part of it"—without showing of what particular part they were in possession. The judgment was for the recovery of the whole lot, with damages for its detention, and on appeal it was assigned as error that the evidence warranted a recovery of only a portion of the lot with proportional damages: *Held*, that under the pleadings and proofs the judgment was proper.

### APPEAL from the Twelfth Judicial District.

The facts are stated in the opinion.

*Henry B. Janes*, for Appellants.

I. Appellants were entitled to a new trial upon the facts disclosed in the affidavit, showing surprise.

II. The evidence was insufficient to justify the judgment, as rendered, for the possession of the entire lot sued for, and damages estimated thereon. The only testimony offered upon this point was that of the witness Nightingale, to wit: "that the defendants were on it in January of that year (1857)—a part of it." "The plaintiff in ejectment must, at the trial, prove the defendants in possession of the premises in question or he cannot recover." (*Jackson v. Ives*, 9 Cow. 661; *Van Horne v. Emerson*, 13 Barb. 526.) A plaintiff in ejectment cannot succeed unless he prove the defendant to be in possession. (*Covley v. Penfield*, 1 W. 244; *Adams on Ejectment*, 319, and authorities there cited.) In an action of ejectment it must appear that defendant dispossessed [398] the plaintiff, \*or was in the actual possession of the land. (*Cooper v. Smith*, 9 Serg. & R. 26.)

If it be contended that the language of the answer is an admission of possession, we reply that the statement therein that "appellants were in possession of one-third, more or less, under lease from their codefendant," could not relieve the plaintiff from proof of the possession in defendants of that portion of the lot not included in the admission. Without such proof, he is entitled to no judgment either for possession or damages, or if he is entitled to any, it is only for

the part, and the judgment of record should be amended so as to conform to the admission. In this case, it should only be for the possession of the one-third, more or less, and damages for the rents and profits of such portion.

A verdict for the whole of the premises claimed, when the plaintiff is entitled to only a part will not be set aside, but will be amended according to the right of the case. (Adams on Ejectment, 388, note and authorities cited; *Seward v. Jackson*, 8 Cow. 406.)

*Whitcomb, Pringle & Felton, for Respondents.*

COPE, J. delivered the opinion of the Court—FIELD, C. J. and NORTON, J. concurring.

The appeal in this case is from a judgment in ejectment, and from an order refusing a new trial. The motion for a new trial was based upon a statement of the evidence, and upon an affidavit alleging surprise on account of the introduction of certain testimony. The affidavit was made by the attorney who tried the case, and sets forth that, from information derived from his clients, no such testimony was anticipated, and that consequently he was not prepared to meet it. The object of the testimony was to prove prior possession in the plaintiff, and the affidavit states that the facts sworn to did not exist, and that the witness who deposed to them was mistaken. The proposition is, that the introduction of evidence which is untrue, and contradicts a state of facts relied upon as correct, makes out a case of surprise, the party not being prepared with countervailing proofs. There is no doubt that false testimony, given by mistake or otherwise, is sufficient to avoid a verdict or decision \*based upon it, if ordinary prudence has been ob- [399] served by the losing party. As to what constitutes ordinary prudence in such cases, no rule can be laid down as universally applicable, nor is it necessary to lay down any rule upon the subject as applying in this case. The decision was based upon a finding in favor of the plaintiff upon a paper title, and the point raised is irrelevant and immaterial. The question of possession was not passed upon, and might have been decided either way without changing the result.

The only additional point is that the evidence was not sufficient to justify the findings. The property sued for is a fifty vara lot in the city of San Francisco, and so far as the title is concerned the sufficiency of the evidence is not questioned. The Court finds the possession of the lot in the defendants Hanly, and it is objected that this finding was not authorized by the evidence. The answer admits the possession of the Hanlys to the extent of one-third, "more or less;" and the witnesses who testified upon the subject stated that they were "on" the lot—"a part of it." What particular part they were in possession of does not appear; and taking the answer and the evidence together, we think the Court was justified in finding as it did. The defense extended to the entire lot, and the possession being proved as to an indefinite part of it, the natural presumption was that it covered the whole. The object in view is to obtain a reduction in the damages awarded as mesne profits, and it is possible that the liability in that respect might have been limited. In order to limit it, however, the defense should have been framed accordingly, specifying the portion of the lot for which it was intended to defend, and disclaiming as to the balance.

Judgment affirmed.

[400]

\*THE PEOPLE v. VANCE.

<sup>1</sup> **INDICTMENT FOR MURDER.**—An indictment for murder is not vitiated by the designation of the offense as "murder in the first degree." *People v. Dolan*, 9 Cal. 576, affirmed on this point.

<sup>2</sup> **IDEM — MALICE HOW ALLEGED.**—It is not essential that the words "with malice aforethought" be used in an indictment for murder, provided terms are employed which, in their import, are equivalent. An indictment which charges that the offense was committed "wilfully, maliciously, feloniously, and premeditatedly," is in this respect sufficient.

<sup>1</sup> As to sufficiency of indictment, cited as authority in *People v. Brown*, 27 Cal. 500; and *People v. Ah Woo*, 28 Cal. 208; and see *People v. Potter*, 35 Cal. 110; *People v. Tomlinson*, Id. 508; *People v. Williams*, Id. 671; *People v. Dick*, 37 Cal. 277; *People v. Bonilla*, 38 Cal. 699; *People v. Stanton*, 39 Cal. 698; *People v. Schmidt*, 63 Cal. 32; *People v. Williams*, 43 Cal. 349.

<sup>4</sup> CHALLENGE TO PANEL OF JURORS.—It is not a good ground of challenge to the panel of trial jurors in the District Court, that it was not drawn and selected as required in sections fourteen and fifteen of the Act concerning Jurors, but was obtained by an order of the Court under the sixteenth section of the same act after the commencement of the term, and without any attempt having been made to comply with the preceding sections. *People v. Stewart*, 4 Cal. 218, affirmed on this point.

VERDICT AGAINST WEIGHT OF EVIDENCE.—A verdict of guilty will not be set aside by the Appellate Court on the ground that it is against the weight of conflicting evidence. There must, to authorize an interference by this Court, be such overwhelming evidence against the verdict as to justify the inference that it was rendered under the influence of passion or prejudice, or bias of some kind.

### APPEAL from the Eleventh Judicial District.

The indictment in this case accuses the defendant of the crime of "murder in the first degree." It does not in terms aver that the killing was "with malice aforethought," but charges that at a certain time and place the defendant did "wilfully, maliciously, feloniously, and premeditatedly kill and murder" the deceased by shooting him with a pistol, giving with sufficient particularity the circumstances of the killing. To this indictment the defendant demurred. The Court overruled the demurrer, and defendant excepted.

For the term at which the case was set for trial no panel of trial jurors was drawn or summoned, as directed by the fourteenth and fifteenth sections of the Act concerning Jurors, but three days after the commencement of the term the Court by an order directed the Sheriff to summon forty-eight competent persons to serve as a trial jury.

The panel thus formed was challenged by the defendant on the \*ground that it had not been drawn [401] and selected as required by law, which challenge the Court overruled, and defendant excepted.

The jury found the defendant guilty of murder in the second degree, and judgment was rendered accordingly, from which defendant appeals.

*C. A. Tuttle*, for Appellant.

The statute defines murder to be the unlawful killing of a human being with malice aforethought, either express or im-

<sup>5</sup> Cited as authority in *People v. Williams*, April T. 1872 (not reported); and see *People v. Dick*, 37 Cal. 277; and *People v. McGungill* April T. 1871 (not reported.)

plied. Murder, then, is the legal appellation of the offense charged in the indictment. The statute further provides that "the jury before whom any person indicted for murder shall be tried shall designate by their verdict whether it be murder in the first or second degree." In the Criminal Practice Act, section two hundred and thirty-eight, is given the form of the indictment, and included in the parenthesis are the words "giving its legal appellation, such as murder, arson, manslaughter, or the like." Murder, then, is the legal appellation of the offense; but there are two degrees of the same crime. Each of these degrees has its own definition and punishment, but both are murder.

The grand jury when they indict should charge simply murder. To the trial jury it is then left to fix the degree of murder.

If the grand jury can indict for murder in the first degree, they can do so for murder in the second degree. If they can indict for murder in the second degree, they can deprive the trial jury of the power of fixing the degree. This would enable it to take away the functions of the trial jury.

In the case of the *People v. Dolan*, 9 Cal. 576, the Court, in discussing this question, says that murder in the first degree necessarily includes murder in the second degree, and that therefore there is no impropriety in the grand jury charging murder in the first degree.

Does murder in the first degree include murder in the second degree? We think not. Murder includes both degrees, but when you add the words "in the first degree," or "in the second degree," do you not limit the charge to that particular degree? Murder in the second degree certainly does not include murder in \*the first degree, and yet, if we strike out the words "in the second degree," it would include both degrees. The addition of the degree to the word murder defines the kind and character of the murder, and limits it to that definition, nor can any other kind of murder be included within it.

II. The challenge to the panel of the trial jury should have been allowed. A jury should be drawn for every regular term of the District Court. (Secs. 14 and 15 of Act concerning Jurors.) The decision in the case of *People v. Stewart*

is, in this respect, we think, erroneous, and the Court is asked to review it.

III. The indictment only charges manslaughter.

The words "wilfully, maliciously, feloniously, and premeditatedly," are not equivalent to malice aforethought.

Section two hundred and forty-four of the Criminal Practice Act provides that words used in an indictment shall be construed in their usual acceptance in common language, except such words and phrases as are defined by law, which are to be construed according to their legal meaning.

The words "malice aforethought" have a legal meaning, and are construed in all the books as necessary in a charge for murder, while the other words used in the indictment only make a charge of manslaughter. (See sec. 19 of Act concerning Crimes and Punishments; 1 Chitty's Crim. Law, 242; 2 Bouvier's Law Dic. 98; Barb. Crim. Law, 54; 3 Hale, 187; 1 East. P. C. 345; Whart. Crim. Law, 1103, 1105, 1121.)

IV. The evidence does not warrant the verdict.

*Attorney-General*, for Respondent.

FIELD, C. J. delivered the opinion of the Court—COPE, J. concurring.

The indictment in this case is for the crime of murder. Two objections are urged to its sufficiency: first, that it designates the crime as murder in the first degree; and second, that it does not charge the commission of the offense with "malice aforethought." The first objection is answered by the case of *People v. Dolan*, 9 Cal. 576. The second objection is met by the fact that words \*equivalent in [403] their import to "malice aforethought" are used. The indictment alleges that the defendant committed the offense "wilfully, maliciously, feloniously, and premeditatedly." The statute declares that it is sufficient if it can be understood from the indictment, so far as the statement of the offense is concerned, "that the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended." (Crim. Prac. Act, sec. 246.) So far as the

motive actuating the accused is essential to the statement, there is no doubt that the terms used constitute a sufficient compliance with the statute. (*Commonwealth v. Chapman*, 11 Cush. 422; *Thompson v. The People*, 3 Parker's Crim. R. 208.)

The objection to the manner and time in which the jurors were summoned is answered by the case of *People v. Stewart*, 4 Cal. 218.

The last objection of the appellant, that the verdict is against the weight of the evidence, is without force. There was evidence both for and against the defendant, and in such cases we do not interfere with the province of the jury. There must be such overwhelming evidence against the verdict as to justify the inference that it was rendered under the influence of passion, or prejudice, or bias of some kind, to justify any interference on our part with the action of the jury.

Judgment affirmed.

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## COOPER v. PENA.

**SPECIFIC PERFORMANCE.**—Equity will not enforce the specific performance of a contract where the party asking its enforcement cannot, from the nature of the contract, be compelled to perform it specifically on his part.

<sup>1</sup> **IDEM—MUTUALITY ESSENTIAL.**—In order that a specific performance of a contract may be compelled, the remedy as well as the obligation must be mutual, and as a general rule the question of mutuality is to be determined by the contract itself, and is not affected by circumstances arising after the contract is made and the rights of the parties fixed.

[404] <sup>1</sup> **IDEM—EXCEPTION TO RULE.**—\*The cases in which a want of mutuality at the time the contract has been entered into has been held not to be sufficient reason for refusing to enforce it—as in contracts with infants, those between lessor and lessee, trustee and *cestui que trust*, voluntary settlements, and the like—are exceptional cases in which peculiar considerations have been allowed to override the principle of mutuality, and they do not contravene the general rule as above stated.

**SPECIFIC PERFORMANCE IN DISCRETION OF COURT.**—The specific performance of a contract is not a matter of course, but rests in the sound discretion of the Court

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<sup>1</sup> Commented on in *Owen v. Frink*, 24 Cal. 178; cited as authority in *Hall v. Center*, 40 Cal. 68; *De Rutte v. Muldrow*, 16 Cal. 505; *Hastings v. Dollarhide*, Oct. T. 1863 (not reported); *Ballard v. Carr*, Oct. T. 1871 (not reported); *Vassault v. Austin*, April T. 1872 (not reported.); *Sturgis v. Galindo*, 59 Cal. 31; *Vassault v. Edwards*, 43 Cal. 465, 466.



upon a view of all the circumstances, and before the Court will act it must be satisfied that the contract is reasonable and equal in its operation.

**CONTRACT FOR PERSONAL SERVICES WILL NOT BE ENFORCED.**—Equity will not enforce specifically a contract for personal services—especially where they are confidential in their nature and involve in their performance the exercise of discretionary authority—but will leave the party to his remedy at law.

**ITEM—OFFER TO PERFORM.**—For the purpose of enforcing specific performance of stipulations, the consideration for which was an agreement by the plaintiff to perform personal services, an offer to perform these services is not equivalent to an actual performance. The rejection of the offer by the defendant excuses the performance as a condition precedent, but does not release the plaintiff from his obligation to perform so long as he insists upon the agreement.

### APPEAL from the Seventh Judicial District.

On the seventh day of October, 1850, the defendant and one Manuel Vaca were the equal joint owners of a large tract of land in Solano County, known as the "Vaca Grant," claimed by them under a Mexican grant, containing ten square leagues. Being desirous of having a partition and division of the tract the defendant employed the plaintiff to act in his behalf in attending to the surveying, marking out, and dividing it between defendant and Vaca, and constituted plaintiff his attorney in fact for that purpose. On the same day the defendant, to compensate plaintiff for his services, executed and delivered to him his bond in the penal sum of \$1,000, for the conveyance of three hundred and twenty acres of land, to be selected by plaintiff, in a body, on any part of the land that might fall to the defendant's share upon the partition of the tract when it should be established. Shortly after the plaintiff, at the request of defendant, went upon the land together with the defendant and Vaca, for the purpose of making the division; and after consultation between the three, it was agreed that there should then be nine square English miles of the land divided off and set apart to the defendant, and a like quantity to the use and \*bene- [405] fit of Vaca, and that the remaining portion should remain undivided until the location and boundaries of the grant should be established by the proper tribunals of the United States Government.

The plaintiff, also, with the consent of defendant, agreed with Vaca on certain boundary lines containing the nine square miles to be set apart to defendant, and he (plaintiff) attended to the dividing off, fixing, and establishing these

boundaries, and Vaca, on the sixteenth of October, 1850, made and delivered to defendant a deed for the same. On the same day, defendant, in consideration of such deed of conveyance to him by Vaca, relinquished his right and title to a like quantity of the land to one McDaniel, at the request of Vaca.

During the year 1857, the tract was located by the proper tribunals and officers of the United States Government, and the boundaries definitely fixed and established, and immediately after plaintiff notified defendant that he was ready to go on and finish making the partition, and tendered his services for that purpose, and defendant then informed plaintiff that he did not want his services, and refused to allow him to have anything further to do in relation to the partition.

The plaintiff then selected one-half section (three hundred and twenty acres) from the nine square miles set apart to defendant, and on the twenty-fourth day of December, 1857, demanded from defendant a deed of conveyance for the tract selected, which defendant refused to make.

The complaint alleges substantially the foregoing facts, and avers that his services rendered in the premises were worth five hundred dollars, and concludes with a prayer for a decree compelling the defendant to convey to him the three hundred and twenty acres of land selected by him, and for general relief in the premises. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, which demurrer the Court overruled, and defendant then answered, denying each and every allegation in the complaint, and also pleading the Statute of Limitations. The case was tried by the Court without a jury, and a decree rendered for specific performance, requiring the defendant to convey the three hundred and twenty acres of land to plaintiff.

[406] A motion was afterwards made by defendant to the Court to set aside the decree, and grant a new trial; and upon the hearing of such motion, the District Court made an order to that effect, from which order the plaintiff has appealed to this Court.

*Thos. M. Swan*, for Appellant.

The decree of specific performance rendered by the District Court is in accordance with the principles of equity jurisprudence. (*Flagg v. Mann*, 2 Sumner, 530; *Benedict v. Lynch*, 1 John. Ch. 379.)

The doctrine of equity allows parties by parol contract and by their acts to vary an original agreement in writing in respect to matters relating to title, and to the time of completion of the contract. (Dart on Vendors, 488; *Price v. Dyer*, 17 Ves. 356.)

It is laid down in Willard's Equity, 297, that "Even the performance of a condition precedent need not be proved, or even averred, when the performance was waived or prevented by the defendant, or the party to be benefited by it." (See also 6 Barb. 281, 297, 251; 21 Wend. 633.)

If the plaintiff has performed so much of his part of the agreement that he cannot be put in *statu quo*, and is in no default for not performing the residue, or is prevented from completing it by the default of the defendant, he is entitled to a specific performance. (Willard's Eq. 297; 1 Mad. Ch. Pr. 331; 1 Forb. Eq. B. chap. 6, sec. 3.)

The plaintiff here has performed a part of the services, and is in no default for not performing the residue: he has shown himself not only prompt but diligent and eager to perform, but has been prevented by the defendant. He cannot be put in *statu quo*, for his remedy at law for his services is barred by the Statute of Limitations; and if he can recover the penalty of the bond, he certainly is entitled to a decree of specific performance. It is a well settled rule that penalties in bonds in such cases are intended and treated as a mere security for the performance of the principal object of the contract or agreement. (Story's Eq. 1317.)

\**John Currey*, for Respondent.

[407]

I. An agreement to be enforced must be mutual in its character and certain in its terms. (2 Wheat. 341; 2 Sum. 278.) If the party seeking to enforce the agreement was not himself liable, and the same could not be enforced against him, there is no reciprocity in allowing him to enforce it against the other party. (Willard's Eq. Jur. 267.) This doctrine is explicitly recognized in *Benedict v. Lynch*, 1 John.

Ch. 307; *Parkhurst v. San Cortland*, 2 Id. 282; *German v. Machin*, 6 Paige, 288; *Woodward v. Harris*, 2 Barb. 439; *Phillips v. Berger*, Id. 611.) Mutuality and certainty are, in general, indispensable requisites to the granting of relief. (*Rogers v. Saunders*, 4 Maine, 92; *Bronson v. Cahill*, 4 McLean, 19; *Tyson v. Watts*, 1 Maryl. Ch. Decis. 13; *Beard v. Linthicum*, Id. 345.) In *Benedict v. Lynch*, 1 John. Ch. 378, the Chancellor said: "It has been ruled in several cases that a bill for a specific performance will not be sustained if the remedy be not mutual, or where one party only is bound by the agreement."

In *Adderly v. Nixon*, 1 Sim. & Stu. 607, it was said, "It has been settled by repeated decisions that the remedy in equity must be mutual, and that where a bill will lie for the purchaser, it will also lie for the vendor." It may, perhaps, be objected to the authorities above cited, that there is a class of cases in which a written contract, signed by the defendant only, can be enforced against him though it could not be enforced against the other party. This is even so, but such cases are admitted to be an exception to the rule as to mutuality of remedies upon agreements, which by the Statute of Frauds must, in order to be binding in law, be in writing, and subscribed by the party to be charged. This exception to the rule as to the necessity of mutual remedies has encountered the animadversions of such enlightened jurists as Lord Redesdale, Chancellor Kent, and Senator Verplank. (*Laurenson v. Butler*, 1 Sch. & Lefroy, 13; *Benedict v. Lynch*, 1 Johns. Ch. 373; *Classon v. Bailey*, 14 Id. 484; *Davis v. Shields*, 26 Wend. 362; Willard's Eq. 267, 268.)

II. The remedies of the parties here were not mutual, because Courts of Equity will not compel specific [408] performance of personal \*services. The consideration to be rendered for the land to be conveyed by defendant to plaintiff was personal service of the plaintiff.

In *Hamblin v. Dinneford et al.*, 2 Ed. Ch. 527, the complaint was in the nature of one for a specific performance. It sought to compel performance of personal service embraced by an agreement in writing. Vice-Chancellor McCoun held, that a Court of Equity would not compel specific performance of a contract for personal service; but said, that the parties must

be left to their remedy at law. The same doctrine is held in *Clark v. Price*, 2 Wilson's Ch. Cas. 157; *Kemble v. Kean*, 6 Simons, 333; 9 Cond. Eng. Ch. 296, 300; *Kimberly v. Jennings*, 6 Simons, 340; *Withy v. Cottle*, 1 Sim. & Stu. 174; 2 Story's Eq. sec. 723.

In the case at bar it cannot and will not, I apprehend, be insisted on behalf of the plaintiff, that he could have been compelled to render the service specified in the power of attorney and bond mentioned in the plaintiff's complaint; and if he could not have been compelled to perform such service, upon what principle can it be insisted that the defendant should be compelled to perform on his part a contract made eight years before the commencement of this action, and that, too, after a slumbering of seven years by the plaintiff, during which time great changes will be presumed to have happened, and are proved to have happened, as to the value of the land sought to be recovered in this action?

III. Courts of Equity, in actions for the specific performance of contracts, first seek to ascertain that the transaction between the parties amounts to and is intended to be a binding agreement for a specific object. (2 Story's Eq. sec. 715.) The ground of the jurisdiction of Courts of Equity to decree a specific performance of agreements is, that a Court of law is inadequate for such purpose, and can relieve the injured party only by a compensation in damages, which, in many cases, would fall far short of the redress which his situation might require. (2 Story's Eq. sec. 715, and cases there cited.)

When the bond was executed by defendant, it was not known what portion of the land would fall to the defendant in that partition, and, therefore, it was provided that the three hundred and twenty acres which plaintiff should have, should be selected by him \*after the partition [409] should be made. Hence, as there was no contract or agreement to convey to the plaintiff any particular piece of land, the land itself could be of no peculiar or special value to the plaintiff; and damages at law, calculated on the market price of the land, as in the case of stocks of goods, would be as complete a remedy for the plaintiff as would the land itself, inasmuch as with the damages he could purchase the

same quantity of land. (2 Story's Eq. sec. 717; Willard's Eq. 279; *Buxton v. Lister*, 3 Atkins, 382; *Reed's Heirs v. Hornback*, 4 J. J. Marsh. 377.)

IV. Due performance of the service by the plaintiff as the consideration for performance by defendant, was a condition precedent to the arising of any obligation on the part of defendant to convey to the plaintiff three hundred and twenty acres of land. (*Colson v. Thompson*, 2 Wheat. 326.)

V. A Court of Equity will not decree a specific performance of a contract for the conveyance of land, when change of circumstances, lapse of time, or other causes would render its enforcement unjust and against good conscience. (*Brazier v. Gratz*, 6 Wheat. 528; *Pratt v. Carroll*, 8 Cranch, 471; *Perkins v. Wright*, 3 Har. & McHen. 326; *Ash v. Daggy*, 6 Ind. 260; Willard's Eq. Jur. 280; 2 Am. Lead. Cases in Eq. part 1, p. 550; *Brown v. Covillaud*, 6 Cal. 571.)

VI. The plaintiff's claim is barred by the Statute of Limitations. Where the Statute of Limitations would be a bar at law, the same rule is applied in a Court of Equity. (15 Pet. 272; 2 Johns. 150; 3 Id. 136; 7 Blackf. 86.) Chancery follows the law, and acting in obedience to the statute the plea of limitation is as available in equity as at law in relation to the same subject matter. (2 Gill. & John. 307; 4 Yerg. 104; 5 Mason, 95, 143; 6 Id. 61; 5 Pet. 470; 3 A. K. Marsh. 554; 1 Bald. 394; 15 Pet. 272; 2 Sch. & Lefroy, 629; 10 Wheat. 176; 16 Pet. 486; 24 Wend. 587.)

COPE, J. delivered the opinion of the Court—FIELD, C. J. and NORTON, J. concurring.

This is an action to compel the defendant to convey to the plaintiff a tract of land in the county of Solano. The [410] action is based upon \*a bond given in 1850, by which the defendant bound himself, in consideration of one dollar, and of certain services to be rendered by the plaintiff, to convey to him the land. It appears that the defendant and one Vaca were joint owners of a grant of land from the Government of Mexico, and that they were desirous of having a partition and division of the land between them. The defendant employed the plaintiff to represent him in the matter, and for the services to be rendered agreed to convey to the

plaintiff three hundred and twenty acres of his share of the land. The bond was given to secure the performance of this agreement, vesting in the plaintiff the right of selection, and binding the defendant to convey as soon as the selection should be made. The partition was partially effected in 1850, but difficulties arose in the way of completing it, and the parties agreed to postpone the completion until the boundaries of the grant should be fixed by the proper authorities. This was not done until 1857, when the plaintiff offered to go on and complete the partition, but the defendant refused to allow him to do so, whereupon he made a selection, and demanded a conveyance. The Court below rendered a judgment in his favor, and the appeal is from an order setting the judgment aside, and granting a new trial.

The plaintiff contends that the judgment was correct, and that the Court erred in setting it aside. Various grounds are urged by the defendant in support of the order, the principal one of which is the want of mutuality in the agreement. So far as the agreement is unperformed, the plaintiff cannot be compelled to perform it on his part, for equity will not enforce a contract for personal services, but leave the party to his remedy at law. In respect to the remedy, therefore, there is no mutuality, and it is universally admitted that equity will not enforce a contract, where the party asking its enforcement cannot himself be compelled to perform it. The contract must be just and equal in its provisions, and the subject matter must be such that equity can take jurisdiction of it, and compel performance by both of the parties. The remedy must be mutual as well as the obligation, and where the contract is of such a nature that it cannot be specifically enforced as to one of the parties, equity will not enforce it against the other. As a general rule, \*the question [411] of mutuality is to be determined by the contract itself, and is not affected by circumstances occurring after the contract is made, and the rights of the parties are fixed. It is a settled principle, that the specific performance of a contract is not a matter of course, but rests in the sound discretion of the Court, upon a view of all the circumstances; and before the Court will act, it must be satisfied that the contract is reasonable and equal in its operation. The rule,

as stated by Chancellor Kent, is, that unless the Court be satisfied that the contract is fair and just, and equal in all its parts, and founded on an adequate consideration, it will not, by the interposition of its extraordinary power, order it to be executed. (*Seymour v. Dalancey*, 6 Johns. Ch. 223.) "If there be," said he, "any well founded objection on either of these grounds, the practice of the Court is to leave the party to his remedy at law for a compensation in damages." In *Tyson v. Watts*, the Court of Chancery of Maryland laid down the same rule, and the Chancellor, in delivering his opinion, said: "In addition to the elements of fairness and justice, the agreement must be mutual before the power of the Court to order its specific performance can be successfully invoked; and indeed it may well be doubted whether a contract can be considered in any respect fair and just if it be not mutual." (1 Maryland Ch. Dec. 13.) The same Court, in *Duvall v. Myers*, 2 Id 401, said: "The right to a specific execution of a contract, so far as the question of mutuality is concerned, depends upon whether the agreement itself is obligatory upon both parties, so that upon the application of either against the other the Court would coerce a specific performance." This was said in reference to a case decided by the Court of Appeals of that State, in which similar language had been used, and it may be stated generally as the result of the authorities upon the subject. (Fry on Specific Performance, 198.) There are cases, however, in which a want of mutuality at the time the contract was entered into has been held not to be a sufficient reason for refusing to enforce it, and these cases, if well founded in principle, must be regarded as exceptions to the rule. It has been held that the performance of a contract on one side entitled the party performing to equitable assistance against the other, though upon [412] an application by the latter the Court could not \*have compelled performance in his favor. A contract with an infant has been held to be enforceable by him after he has become of age, notwithstanding the want of mutuality in the first instance, the same effect being given to the contract in equity as at law. A lessee may enforce a contract to renew a lease, which could not be enforced against him; but this results from the prior lease, and the nature of the contract



itself, and can hardly be regarded as an exception to the rule. A contract between a trustee and his *cestui que trust* may be enforced by the latter, but not by the former; and under certain circumstances a voluntary settlement may be enforced by the beneficiary, who could not, of course, be compelled to accept it. In these cases, however, there are considerations which override the principle of mutuality; and we are not aware of any case involving a reciprocity of obligation, in which a contract has been enforced in favor of a party who had not actually performed it, or could be compelled to do so. It is safe to say that no such case exists, and that equity will not interfere in favor of one of the parties where it is incapable of doing justice to the other, by enforcing the entire contract according to its terms. Taking this as the rule, there is no difficulty in applying it in the present case, and it is unnecessary to hold that the position of the parties, as to equitable relief, was determined by the want of mutuality in the beginning.

We have already stated that the plaintiff cannot be compelled to complete the services which he agreed to perform, and the fact that he has offered to complete them is not equivalent to actual performance. The rejection of the offer by the defendant excuses the performance as a condition precedent, but does not release the plaintiff from his obligation to perform, so long as he insists upon the agreement. As this is an obligation which the Court cannot enforce, there is no principle which would justify it in enforcing the obligation on the other side; and the only course is to decline to interfere, and leave the plaintiff to his remedy for damages. It is proper to remark that there is no assurance that the offer could be carried out, for there is a third person to be consulted, who might refuse to act in the matter, or might not agree to a satisfactory partition. This is an insuperable objection to any relief looking to the \*completion [413] of the services in future, even if the Court had the power, so far as the plaintiff is concerned, to enter a compulsory order in that respect. Besides, the services are of such a character that no Court would compel their acceptance, as they are confidential in their nature, and involve in their performance the exercise of discretionary authority.

It follows that the order granting a new trial must be affirmed, and that the further action of the Court below is to be limited to an adjustment of the damages which the plaintiff has sustained.

The order is affirmed, and the cause remanded.

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### OULLAHAN v. STARBUCK.

**ORDER AWARDING A NEW TRIAL IN DISCRETION.**—Where on appeal from an order granting a new trial the record shows that the motion was made upon several grounds without showing upon which of them the action of the Court below was based, the order will not be reversed if it was within the discretion of the Court to make it upon any of the grounds stated.

**IDEM.**—The action of the District Court in granting a new trial on the ground of <sup>1</sup>alleged insufficiency of the evidence, will not be interfered with when the evidence is conflicting, although the Appellate Court may differ in opinion with the lower Court as to the weight of the evidence.

#### APPEAL from the Fifth Judicial District.

Action to recover a balance alleged to be due on a sale of personal property. Defense that the transaction was not a sale but only a pledge of the property to secure an indebtedness due defendant from plaintiff.

In empanneling the jury a peremptory challenge as to one of the jurors was interposed by plaintiff, and denied by the Court, to which plaintiff excepted, and a bill of exceptions embodying the facts in relation to the challenge was made out and signed by the Court.

The jury found for the defendant, and plaintiff moved for a new trial. The statement as settled showed that the motion was based on three grounds: "1st, misconduct of the [414] jury; 2d, error of law \*occurring at the trial, and excepted to by plaintiff; 3d, insufficiency of the evidence to justify the verdict, and that it is against law." On the second ground, the statement referred to the bill of exceptions on file. In support of the third ground, it set forth at length the evidence in the case which was conflicting. After

<sup>1</sup> *Gerold v. Brunswick & Balke Co.*, 67 Cal. 124. See 8 Nev. 76.

argument, the Court entered the following order: "The motion of the plaintiff for a new trial of this cause having been heretofore submitted to the Court, and having been taken under advisement, now, at this day, the Court being sufficiently advised of its judgment, herein doth order that said motion be granted."

The transcript on appeal, (which is by defendant from this order,) contains nothing, beyond the statement and the order, to show upon what ground the new trial was granted.

*Geo. W. Tyler* and *M. G. Cobb*, for Appellant, argued that the Court properly denied plaintiff's challenge to the juror, and therefore erred in granting a new trial.

*Tbd Robinson*, for Respondent, contended that the evidence was conflicting, and therefore the granting of a new trial was within the discretion of the Court, and not revisable.

FIELD, C. J. delivered the opinion of the Court—COPE, J. and NORTON, J. concurring.

It is stated by the appellant's counsel that the only ground upon which the Court below based its action in granting the new trial, was a supposed error in its refusing to allow a peremptory challenge to a juror after he had been accepted, though not sworn. We do not doubt that such was the fact, but the record does not show this, and by its contents we must be governed. The record shows that the motion was also made on the further ground that the evidence was insufficient to justify the verdict, and does not indicate upon which of the two grounds the Court based its ruling. There was conflicting evidence on the trial, though the evidence which is stated in the record appears to fully support the verdict. It is not enough, however, to authorize any interference with the action of the Court below—either in granting or refusing a new trial for \*alleged insuffi- [415] ciency of the evidence—that an Appellate Court, judging from the evidence as it is reduced to writing, would have come to a different conclusion. The Court before which the witnesses are examined is generally better qualified to determine the propriety of granting or refusing a new trial on

this ground than any Appellate Court; and its action in this respect will not be disturbed except for the most cogent reasons.

It is unnecessary, therefore, to pass upon the question whether a right to challenge peremptorily a juror in a civil case under the statute exists until the jury are sworn.

Order affirmed.

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## IN THE MATTER OF CARLOS OLIVEREZ.

**JUDICIARY SYSTEM—CONSTITUTIONAL AMENDMENT.**—The purpose and effect of article six of the amendments to the Constitution recently adopted is not to suspend the administration of any portion of the laws of the State, but to provide a judiciary system which will go into operation when the necessary officers shall be elected pursuant to laws to be hereafter enacted, and to continue the former judiciary system in force until the new one shall be in a condition to exercise its functions.

**IDEM—ORGANIZATION OF NEW COURTS.**—The Courts of Sessions continue as organized Courts with their jurisdiction unimpaired, notwithstanding the adoption of the constitutional amendments, until the organization of the new Courts by which, as provided in those amendments, they are to be superseded.

**AMENDMENT, EFFECT OF ON ORIGINAL PROVISIONS.**—The old provisions of the Constitution will cease to have effect from time to time as the substituted provisions commence to operate.

### APPEAL from the Twelfth Judicial District.

The Legislature of 1861 proposed certain amendments to the Constitution, of which article six, providing for the reorganization of the judiciary department, will be found in full at the close of this volume. These amendments were adopted by the Legislature of 1862, and at the general election of that year were submitted to a vote of the people of the State. On the fourth of November thereafter, the Governor issued a proclamation declaring the adoption of the amendments by a majority of the popular vote.

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<sup>1</sup> Cited as to construction of constitutional amendments, in *People v. Maguire*, 32 Cal. 143; *People v. Provinces*, 34 Cal. 524; *Gillis v. Barnett*, 38 Cal. 395. See also *People v. Mier*, 24 Cal. 67.

The petitioner was, on the ninth of December, 1862, by a judgment of the Court of Sessions of the county [416] of San Francisco, sentenced to sixty days' imprisonment in the county jail. On the thirteenth of December a petition on his behalf was presented to the Supreme Court alleging that he was unlawfully restrained of his liberty by the Sheriff of that county, and that the illegality consisted in the invalidity of the judgment of the Court of Sessions, which Court, it was claimed, had no legal existence subsequent to the adoption of the constitutional amendments. A writ of *habeas corpus* was issued by the Chief Justice returnable before the Court, and the matter was subsequently heard before the full bench.

*Alex. Campbell*, for the Petitioner.

*Attorney-General*, for the People.

NORTON, J. delivered the opinion of the Court—FIELD, C. J. and COPE, J. concurring.

Carlos Oliveres is imprisoned in the jail of the county of San Francisco, under a sentence pronounced by the Court of Sessions of that county, on the ninth day of December, 1862, and claims his release upon an allegation that at the time said sentence was pronounced there was no such tribunal as the Court of Sessions existing in said county.

In support of this allegation he insists that the amendments to the Constitution submitted to the people at the last election went into operation on the fourth day of November last, being the date of the proclamation issued by the Governor, announcing the fact that a majority of the votes cast upon the question of such amendments were in favor of the amendments; and that the Court of Sessions ceased to exist when the former provisions of the Constitution under which it was organized were displaced by the new, which do not provide for a continuation of that Court.

Article six of the amendments provides for the organization of new Courts, and the election of Judges for them at a special election to be provided by law; and section nineteen of that article provides that by the taking effect of the amendments

no officer shall be superseded, nor shall the organization of the several Courts be changed until the election and [417] qualification of the several officers \*provided for in said amendments. The effect of this provision of section nineteen is to continue the Court of Sessions as an organized Court, and to continue the officers by which it is held until the organization of the Court by which it is to be superseded. The Court undoubtedly continues to exist.

But it is further urged, that though the Court of Sessions may be continued as an organized tribunal it is without any jurisdiction, because by section one of article six of the amended Constitution the judicial power of the State is vested in certain specified Courts, among which the Court of Sessions is not named.

If such an interpretation should be adopted it would have the effect to deprive the nineteenth section of any practical meaning or operation. It would be doing merely a vain thing to continue the organization of the Courts if they could exercise no jurisdiction. It would also suspend the operation of all the criminal laws of the State which are now administered by the Court of Sessions until the new Courts shall be organized, because under existing laws no other Court is authorized to administer them. Indeed, an interpretation of the amended Constitution which should immediately deprive the Court of Sessions of all jurisdiction, would equally deprive all the other Courts now existing in the State of all jurisdiction, because the Courts spoken of in the first section of article six, in which the judicial power of the State is to be vested, are not the Courts now in existence, but those which are to be organized under the amended Constitution, and the succeeding sections provide for the future organization of those Courts by the election of Judges at a special election to be hereafter provided by law. But these Courts to be hereafter organized are not the Courts now existing, although similar in name and in their general powers. If they were to be organized in precisely the same manner they would not be the same Courts, but in fact they are to be essentially different in their organization, and their functions are to be in many particulars different. If, then, the existing Courts cannot exercise any jurisdiction which was conferred upon them by

the old Constitution, the operation of the whole judicial system is for the time suspended. It is hardly necessary to say that the Legislature in proposing and the people in adopting the amendments could not have intended \*such results. [418]

That the objects to be effected are to be taken into consideration in determining the meaning of a statute; that no construction should be put upon a statute that would lead to an absurd consequence; that a statute must be so construed that all its parts can, if possible, have an effect; and that the meaning of any particular provision is to be ascertained by considering the whole statute, are familiar rules of statutory construction and equally applicable to the interpretation of the provisions of a Constitution. Interpreting the amendments to the Constitution by these rules, there can be no difficulty in determining that the purpose and effect of article six is not to suspend the administration of any portion of the laws of the State, but to provide a judiciary system which will go into operation when the necessary officers shall be elected pursuant to laws to be hereafter enacted, and to continue the former judiciary system in force and operation until the new one shall be in a condition to exercise its functions. There is no express repeal of the former provisions of the Constitution. They merely cease to exist by reason of new provisions upon the same subject being substituted for them, and there is no incongruity or inconsistency in the amendments taking

effect at once, so far as to authorize the necessary measures to be taken for the organization of the new Courts, while the former provisions continue in force so far as to uphold the existing Courts, and authorize the exercise of their jurisdiction until the new Courts shall be prepared to exercise the jurisdiction intended to be substituted. The old provisions will cease to have effect, from time to time, as the substituted provisions commence to operate. The adoption of the amendments without restriction might have operated to repeal the old provisions upon the same subject; but it is the obvious intent of the nineteenth section, as it is common to provide by the repealing clause in a new statute, that the repeal shall, for a limited period, be only partial.

It was argued by the District Attorney that the amendments have not been adopted, in consequence of there being

certain discrepancies between the amendments as they were proposed by the Legislature and as they were published previous to the election in 1861. It has not been necessary for us to consider this question, since, according to the [419] views we have expressed, the Court of Sessions is \*in existence and empowered to exercise the jurisdiction conferred on it by law under the Constitution as heretofore existing, whether the amendments have been adopted or not. The prisoner must be remanded.

### RHODES v. CRAIG *et al.*

**ORDER STAYING PROCEEDINGS NOT APPEALABLE.**—An order made in an action pending in the District Court staying all proceedings therein until the further direction of the Court, is not an appealable order. The remedy of a party prejudiced thereby is by application for a *mandamus* to compel the Court to proceed.

**STATE PATENT AS EVIDENCE OF TITLE.**—Where the plaintiff in ejectment claims title under a State patent issued upon a school warrant location, the invalidity of the location cannot be interposed as a defense to the action, nor the efficacy of the patent be contested, by one in possession, who admits that the premises are a part of the public lands of the United States, and traces no title from the United States to himself.

### APPEAL from the Fifteenth Judicial District.

The plaintiff commenced an action of ejectment against the defendants, deraining title from J. G. Doll, to two "town lots" lying in the town of Red Bluff. The complaint contained three counts: the *first* alleging seizin in Doll on the twenty-ninth of October, 1862, and that afterwards, on same day, he conveyed to plaintiff, etc.; the *second* alleging a seizin in plaintiff on that day, etc.; and the *third*, an unlawful entry into the possession of plaintiff by defendant. The answer denied, upon information and belief, the seizin of Doll and plaintiff, and set up adverse, actual possession in defendant, A. Craig, and went on to state, that in 1855, the land was public, vacant, and unsurveyed land of the United States, and defendant entered and made improvements; that in 1853 the town of Red Bluff was laid out into blocks and streets; that

<sup>1</sup> *Avery v. Superior Court*, 57 Cal. 250.

<sup>2</sup> *Chapman v. Quinn*, 56 Cal. 278.



under the Act of Congress of May 23d, 1844, the site of the town was reserved from sale, entry, and preëmption, and has been used and claimed as a town site ever since; that the town was never incorporated; that previous to 1862, its inhabitants frequently requested the County [420] Judge to make the requisite entry in the Land Office to secure the town site for the use of the inhabitants, and furnished him with money for that purpose, but that he refused to make the entry; that in 1862, the Board of Supervisors of Tehama County, on petition, appropriated three hundred and seventy-two dollars to purchase said land, and authorized the County Judge to make the proper entry, and that he tendered the money for this purpose in the Land Office; that Doll has resided in Red Bluff all the time since 1855, and knew these facts, etc.; that Doll, on the twenty-ninth of October, 1862, claimed the land embraced within the limits of the town, by virtue of a California School Land Warrant location, in his name, upon the same, embracing the premises in controversy; that said location was fraudulently made, and that the proceedings of Doll, upon which it was obtained, have been set aside by an order of the General Land Office of the United States, and a rehearing of the contest between Doll and the inhabitants of Red Bluff granted; that evidence was taken before the Agent of the Land Office at Marysville, and forwarded to Washington City to the General Land Office for final decision, and that this proceeding is still pending and undetermined.

After filing the answer, and on five days' notice, the defendant, A. Craig, moved on the twelfth of February, 1863, "that the further prosecution of this action, and all proceedings in the same, be stayed, and that said plaintiff be enjoined and restrained by an order of this Court from further prosecuting said action until the final decision of the contest, now pending before the General Land Office at Washington, for the land embraced in the town site of Red Bluff, between J. G. Doll and the inhabitants of the said town of Red Bluff, is had and obtained." The notice stated that the motion was based on the answer and other papers in the case. To meet this motion, the plaintiff filed an affidavit stating that it was not true that Doll claimed the land by virtue of a School Land Warrant,

but, on the contrary, that he claimed by virtue of a patent issued by the Governor of the State of California to him for the land, on the twenty-fourth of August, 1859, which patent was duly recorded in Tehama County, September 1st, [421] 1859; and \*that defendant and his attorney knew that fact at the time of filing the answer.

The Court thereupon made the following order:

“*W. H. Rhodes v. Craig et al.* Now comes *W. H. Rhodes* and files his affidavit resisting motion of defendants for a restraining order. It is ordered by the Court, after consideration thereof, that all proceedings in this action be and the same are hereby restrained and enjoined until the further order of this Court.”

From this order the present appeal is taken by plaintiff.

*W. H. Rhodes*, Appellant in *pro per*.

The District Court erred in making the order restraining plaintiff from prosecuting his action until further order of said Court.

I. The order itself is void. The statute allowing injunctions has been violated: 1st. Because an injunction can only issue upon affidavit, and the filing of an undertaking, with sufficient sureties to the effect that the plaintiff will pay to the party enjoined the damage occasioned by the improper issue of the injunction. (Practice Act, secs. 113, 115; *Elliot v. Osborne*, 1 Cal. 396; 1 Barb. Ch. 167.) The plaintiff alleged, and defendant did not deny, that defendant was in possession, and that the premises were worth twenty dollars per month. And 2d. There is no time fixed for the operation of the injunction. It is to continue forever, provided the Judge does not change his mind; it is ordered to stand “until his further order.” Suppose he dies or never relents, must the plaintiff suffer for the misfortune, or the obstinacy, or the corruption of the Judge?

II. There was no sufficient showing made for an interminable injunction, or for any injunction at all. The pleadings and affidavit show that Doll had his patent to the land duly recorded before he sold to plaintiff, issued in due form of law by the Governor of California. This is not denied by any counter affidavit, and could not be.

The question, therefore, is narrowed down to the inquiry: Can the pendency of an immaterial issue, before a mere Land Office Clerk, be alleged as sufficient grounds upon which to base an injunction?

\*1st. An injunction will not issue unless the case [422] be pending in some Court having jurisdiction of the subject matter. In England it must be in the Courts of Law, in the Spiritual Courts, the Courts of Admiralty, or in some other Courts of Equity. (*Waterman's Eden. on Inj.* 10; 15 *How. Prac.* 236; 6 *Duer*, 697.)

2d. Nor where the subject matter is not the same, and the parties the same, nor where the right is doubtful unless first established at law. (*Phillip's Admin. v. Thompson*, 3 *Stew. & Por.* 369; *Attorney-General v. Hunter*, 1 *Dev. Eq.* 12.)

3d. An injunction to protect property during litigation will not be allowed where the complaint shows that the party seeking the injunction has no title to nor interest in the property, and no claim to the ultimate relief sought by the litigation. (*State of California v. McClynn*, 20 *Cal.* 275; *Treadwell v. Payne*, 15 *Id.* 496.) Nor will an injunction lie where a party has a good defense at law, and can make it. (*Lewis v. Tobias*, 10 *Cal.* 577; *Smith v. Sparrow*, 13 *Id.* 596.)

III. But the Supreme Court has already passed upon this cause in its every aspect, by the decision of the case of *Doll v. Meador*, 16 *Cal.* 295. The patent is conclusive until steps have been taken to revoke it by *scire facias*. (*Doll v. Meador*, 16 *Cal.* 324; *Moore v. Wilkinson*, 13 *Id.* 478.)

*J. Chadbourne*, for Respondent.

FIELD, C. J. delivered the opinion of the Court—COPE, J. concurring

It is difficult to perceive upon what ground the order staying proceedings in this action can rest, except the bare possibility that the officers of the General Land Office at Washington may come to a different conclusion from that of the authorities of the State as to the validity of the location of the school warrant upon which the patent to Doll was issued. But even if such a conclusion should be reached, no defense based thereon could be interposed to the present action.

Until an entry on behalf of the inhabitants of the town of Red Bluff is made, or a patent of the General Government is issued for the benefit of such inhabitants, the defendants will not be \*in a position even to contest the efficacy of the patent to Doll. As we said in *Doll v. Meador*, 16 Cal. 331, "until some one appears prepared to trace title to himself from a common or paramount source, parties who are clothed with the solemn evidence of title furnished by the patent of the State may rest in security, without fear of any successful disturbance in the enjoyment of the property held by them, whether that property be a portion of the school lands or swamp lands granted to the State by the General Government."

As appears from the report of the case from which this citation is made, the time within which, under the Act of Congress of May 23d, 1844, an entry could be made for the benefit of the inhabitants of the town of Red Bluff, had expired years before the patent to Doll was issued.

The difficulty, however, with the present case is that no appeal lies from the order of the Court. It is not an injunction against parties in another action; it is a simple order staying proceedings in the same action. The remedy of the plaintiff is not by appeal, but by application for a *mandamus* to compel the Court to proceed.

Appeal dismissed.

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### HESTRES, ADMINISTRATOR, v. BRANNAN *et al.*

<sup>1</sup> **EJECTMENT—PROOF OF PRIOR POSSESSION.**—In an action of ejectment where the plaintiff relied upon prior possession, his proof showed that several years before defendant's entry he inclosed the premises with a fence, and afterwards, and until the adverse entry, cultivated the inclosure by raising and gathering crops thereon: but there was no direct proof of the character of the fence or its efficiency: *Held*,

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<sup>1</sup> Cited as authority in *Polack v. McGrath*, 32 Cal. 20; and see *Wolf v. Baldwin*, 19 Cal. 315; *Hutton v. Schumaker*, post 453; *Davis v. Perley*, 30 Cal. 638; *Brummagin v. Bradshaw*, 39 Cal. 44; *Walsh v. Hill*, July T. 1871 (not reported.)

that the possession was sufficiently proved; that the use of the property for a series of years, for purposes requiring an inclosure, was enough to show that the inclosure was a suitable one for those purposes, and sufficiently substantial to protect the premises.

APPEAL from the Fifth Judicial District.

The facts are sufficiently stated in the opinion of the Court.

*Brown & Graves*, for Appellants.

\*Where a title to land rests in acts *in pais*, one of [424] which is a substantial inclosure, the party, to make out his title, is required to show affirmatively the character of his inclosure, in order that the Court may see whether or not it is substantial and therefore sufficient (*Wolf v. Baldwin*, 19 Cal. 306; *Plume v. Seward*, 4 Id. 96; *Murphy v. Wallingford*, 6 Id. 649; *Humphreys v. McCall*, 9 Id. 64; *Wright v. Whitesides*, 15 Id. 47; *Garrison v. Sampson*, Id. 95; *Corryell v. Cain*, 16 Id. 572; *Preston v. Kehoe*, 15 Id. 318.)

*John B. Hall*, for Respondent.

COPE, J. delivered the opinion of the Court—NORTON, J. concurring.

This is an action brought by the plaintiff's intestate, Comstock, to recover a tract of land in the county of San Joaquin. A judgment was recovered by Comstock, who died soon afterwards, and Hestres, the administrator of his estate, was substituted as plaintiff. On the trial Comstock relied upon prior possession, and the defendants contend that the evidence upon the subject was not sufficient to entitle him to recover. The land includes several hundred acres, and was used by Comstock for agricultural purposes. It was proved that he inclosed it in 1856, but the character of the inclosure was not shown, except that there was a fence. The land was cultivated prior to and in 1858, and volunteer crops were gathered from it in 1859 and 1860. In the fall of 1860 Comstock removed to Nevada Territory, employing persons to take charge of the property, and keep the fence in repair. The defendants took possession in 1861, and deny the right to possession asserted by Comstock.

The point made is that there was a failure of evidence in

regard to the inclosure. The witnesses who testified to the fence expressed themselves in general terms, stating merely that there was one, without describing it. There was no direct evidence as to its efficiency in any respect, and it is contended that in the absence of such evidence there was nothing for the jury to act upon. The argument is that it was necessary to show an actual *bona fide* possession, and that this could only be done by showing a substantial inclosure, and a meritorious use of the property. Admitting the correctness of the argument, however, it does not follow that the evidence was insufficient, for the character of the inclosure was indicated by the nature and circumstances of the use. The use of the property for a series of years, for purposes requiring an inclosure, was enough to show that the inclosure was a suitable one for these purposes, and sufficiently substantial to protect the possession. We are of opinion, therefore, that there was sufficient evidence to establish the fact of possession; and the record discloses no error for which the verdict should be set aside.

Judgment affirmed.

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### HESTRES, ADMINISTRATOR, v. CLEMENTS *et al.*\*

**DEMURRER TO BE DISPOSED OF BEFORE ENTRY OF JUDGMENT.**—It is irregular to enter judgment against a defendant, on whose behalf a demurrer is on file, without disposing of the demurrer, and a judgment so entered will be reversed on appeal.

**DEFAULT NOW WAIVED.**—An acceptance by plaintiff's attorney of service of a demurrer, filed by a defendant after his default has been entered, is a waiver of the default.

APPEAL from the Fifth Judicial District.

Ejectment by Emile Hestres, administrator of Comstock against Thomas Brannan, Charles L. Clements, Andrew Har-

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\*Referred to in *Calderwood v. Tevis*, 23 Cal. 335

ris, and — Hopkins, to recover a tract of land and mesne profits.

The complaint was filed and a summons issued April 7th, 1862, and on the same day the Sheriff delivered to Clements & Harris each a copy of the summons, but without a copy of the complaint. On the 24th of April a like service was made on Hopkins, and Brannan was served with copy of summons and copy of complaint, all in San Joaquin County. April 26th, the Clerk entered a default against Clements & Harris, and, May 8th, against Brannan. May 5th, (the 4th being Sunday,) Clements and Hopkins each filed a demurrer, on each of which was indorsed an acceptance of service as follows: "Service of the within accepted May 5th, 1862. Terry & Bradford, attorneys for plaintiffs." On the eighth of \*May, the Court overruled the demurrer of [426] Hopkins, and premising that it appeared that the other defendants had made default, entered judgment against all for possession of the premises and \$2,500 damages. On the next day, the attorney for Clements and Hopkins moved, on affidavit, that the judgment be vacated, and that these defendants have leave to answer, which motion was denied, and from this order the appeal is taken.

*G. W. Tyler*, for Appellants.

*Terry & Bradford*, for Respondents.

CORP, J. delivered the opinion of the Court—NORTON, J. concurring.

The judgment in this case must be reversed for irregularity in the proceedings. When the judgment was entered, there was a demurrer on file which had not been disposed of. Two of the defendants demurred separately, and the record shows that but one of the demurrers was acted upon. The other was filed after a default had been taken, but the attorneys for the plaintiffs accepted service of it, thereby waiving the default.

Judgment reversed, and cause remanded.

## HUFFMAN v. SAN JOAQUIN COUNTY.

<sup>1</sup> COUNTY LIABILITY IN DAMAGES.—A county is not liable in damages at the suit of an individual for injuries sustained by him in consequence of the want of proper repairs to a bridge on a public highway of the county.

INJURIES RESULTING FROM NEGLIGENCE.—The statute devolves upon Boards of Supervisors the management and control of bridges in their respective counties, and upon Road Overseers of the county the duty of keeping bridges on public highways in repair; and if any remedy exist for injuries resulting from neglect to keep such bridges in repair, it must be sought against the Road Overseers or Supervisors personally.

APPEAL from the Fifth Judicial District.

The facts appear in the opinion of the Court.

*H. Amyx and Budd & Laspeyre, for Appellant.*

[427] \*I. An indictment lies at common law against a county for the non-repair of a bridge, a part of a public highway. This was so held by Lord Ellenborough, with the concurrence of all the other Judges, in the case of *The King v. West Riding, Yorkshire*, 2 East. 341; and he cites Lord Coke (2 Inst. 700, 701) as authority for the doctrine. (See also *Glasburne Bridge case*, 5 Burrows, 2594; *The King v. County of Glamorgan*, 2 East, 356; note to *Rex v. Bucks*, 12 Id. 192; Grant on Corporations, 500; 7 Q. B. 594; Ventr. 256; *Rex v. Mayor, etc., of Warwick*, 2 Show. 201.)

II. If a corporation be indictable at common law for the non-performance of a public duty, an action will lie at the suit of an individual sustaining special damage thereby. (See the case of *The Mayor, etc., of Lyme v. Henly*, finally decided in the House of Lords on writ of error; see 1 Bingh. New Cases, 222.) That case was first heard in the Court of Common Pleas, (5 Bingh. 91,) then on writ of error in King's Bench, (see 3 Barr. & Ald. 77,) and finally in the House of Lords. Before the decision in the House of Lords, certain questions were submitted to the Judges, and Park, Judge, in answering the question for the rest of the Judges, uses this strong language: "It is clear and undoubted law that when-

<sup>1</sup> Cited as authority in *Crowell v. Sonoma County*, 25 Cal. 315; and see *Sherbourne v. Yuba County*, ante 113; *Winbigler v. Los Angeles*, 45 Cal. 38; *Barnett v. Contra Costa Co.*, 67 Cal. 78. See 54 Wis. 532.



ever an indictment lies for non-repair, an action on the case will lie at the suit of a party sustaining any peculiar damage." (1 Bingham N. C. 240; see also, deciding the same point, *The Mayor, etc., of Lynn v. Turner*, Cowp. 86; *Churchman v. Tunstall*, Hard. 162; *Payne v. Patridge*, Show. 225; Carth, 191; *The Mayor, etc., of the City of New York v. Furze*, 3 Hill, 612.)

The case of *Russel v. The Men of Devon*, 2 Term Rep. 667, was relied on by the respondent below as upholding a different doctrine. If this be so, then the case of *Russel v. The Men of Devon* is no longer law, since the case of *The Mayor, etc., of Lyme v. Henly* is a more recent decision, rendered after greater consideration, and by a higher authority.

But the case of *Russel v. The Men of Devon* solely decides this: that the men living in a county are not a corporation, and cannot be sued as such at common law (5 Bingham 99;) and the \*same doctrine is held to be law by our [428] own Courts. (See 15 Cal. 34.) In the case of *Russel v. The Men of Devon*, if judgment had been recovered by plaintiff, execution could have been levied on the private property of any one of the inhabitants; but in case of a judgment against a county, execution cannot be levied on the private property of residents therein. (*Emeric v. Gilman*, 10 Cal. 404.)

III. The statutes of California authorizing the suing of counties, render them equally amenable with other corporations to actions at the suit of individuals. It is conceded that at common law a county, being a political division of the State and a part of the sovereignty, could not be sued by an individual, either on contracts, for a tort, or non-feasance, without permission of the sovereign power (5 Cal. 288, 12 Conn. 404, 3 McLean, 580;) but when this permission of the sovereign power has been given by an act of the Legislature, as it has been in this State, then the county, like any person or municipal corporation, becomes amenable at the suit of an individual for violation of its obligations, whether of contracts, or for torts, or non-performance of duty, and is subject to like remedies. (3 McLean, 580; Statutes of 1855, chap. 47, sec. 24.)

The case of *McCann v. Sierra County*, 7 Cal. 121, decides that the provisions of the Statutes of 1857 and 1855 in relation

to suits against counties apply to all cases of a demand against a county, whether for torts or on contracts; and corporations have been held liable in an action on the case for non-performance of duty, long before they were held liable for an actual trespass. (Grant on Corporations, 289.) It may be contended that the statute makes it the duty of the Board of Supervisors of the County, and of Road Overseers, to attend to the repair of county bridges. This may be so; but it is no answer to an action or an indictment against the county, if the duty rests on the county also. A person or corporation cannot be excused for non-performance of duty by showing that their agents have not performed their duty; two wrongs cannot make a right. (See opinion of Nelson, 7 Hill, 618; *The King v. The Inhabitants of Netherthong*, 2 Barr. & Ald.

179, and *The King v. The Inhabitants of St. George*, [429] *Hanover Square*, \*3 Campb. 222.) In the last case the defendants were indicted for not repairing a pavement; and in answer, they showed that it had been made the duty of certain officers by statute to attend to the subject, and a fund put under their control for that purpose. But the Court held the defendants were not thereby exempt; that they must on the first instance see that the street was properly paved, and seek a remedy over against the Commissioners.

IV. Aside from precedents, there is great reason and justice in the maintenance of this action. The bridge is the property of the county. No one but the county and its authorized agents have a right to meddle with it. Taxes have been granted to the county by the Legislature for the maintenance of bridges and roads, and the tax-payer and the citizen have a right to feel secure in person and property while traveling a public highway, and if damaged in either person or property, by neglect of the county to keep the same in suitable repair, he has a right to appeal to a Court of Justice for that reparation which a jury of his country may be willing to give.

*H. B. Underhill*, District Attorney, for Respondent.

FIELD, C. J. delivered the opinion of the Court—COPE, J. and NORTON, J. concurring.

The plaintiff in this action seeks to recover damages against the county of San Joaquin, for injuries alleged to have been sustained by him in consequence of the want of proper repairs to a bridge on a public highway of the county. The complaint alleges, substantially, that it was the duty of the county to keep the bridge in question in proper repair and condition; that the bridge was out of repair and "dangerous for travel;" that the county neglected to repair it, and that the plaintiff had sustained special damage thereby; and that his claim for damages had been presented to the Board of Supervisors of the county, properly vouched, and been rejected. The case comes before us on demurrer to the complaint, the Court below having sustained the demurrer and entered final judgment thereon.

There was no error in the ruling of the Court. The statute \*devolves upon Boards of Supervisors the [430] management and control of bridges in their respective counties, and upon Road Overseers of the county the duty of keeping bridges on public highways in repair. (Act creating Board of Supervisors of March 26th, 1855, sec. 9; and Act concerning Roads and Highways of April 28th, 1855, sec. 5.) If any remedy exist for injuries resulting from neglecting to keep such bridges in repair, it must be sought either against the Road Overseers or Supervisors personally.

Judgment affirmed.

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### GODDARD v. FULTON *et al.*

**ANSWER—AFFIRMATIVE ALLEGATIONS IN EFFECT DENIALS.**—Where the allegations of an answer, although stated in an affirmative form, are in effect only a denial of the allegations of the complaint, they do not constitute new matter within the meaning of our Practice Act.

**NEW MATTER IN ANSWER.**—If the answer either directly or by way of necessary implication admits the truth of all the essential allegations of the complaint which show a cause of action, but sets forth facts from which it results that, notwithstanding the truth of the allegations of the complaint, no cause of action existed in the plaintiff at the time the action was brought, those facts are new matter; but if the facts averred in the answer only show that some essential allegation of the complaint is untrue, then they are not new matter, but only a traverse.

ANSWER ON PROMISSORY NOTE NEW MATTER.—To a complaint in the usual form upon a promissory note, an answer was filed admitting the signing of the note but averring that it was made, not on account of any indebtedness existing between the parties but for the purpose of being used as collateral security for a debt due to a third person, from the maker and payee jointly; that the joint debt was subsequently paid, and that the note having thus become *functus officio* should have been canceled, but through fraud was taken and held by the payee, and transferred without consideration by him to the plaintiff: *Held*, that these allegations were not new matter, which, under the system of replications then in force, was admitted by a failure to reply; that their only effect was to deny that any obligation of the character counted upon in the complaint was ever created by the signing of the instrument, and thus to traverse its essential allegations

### APPEAL from the Twelfth Judicial District.

The facts are stated in the opinion of the Court.

*Whitcomb, Pringle & Felton*, for Appellant.

[431] \*We put the case on this single proposition: That the matter in the answer which is relied upon as constituting new matter is simply in direct contradiction of two specific material allegations of the complaint, and only amounts to a circumstantial denial of the delivery of the note and mortgage by Fulton to McKee, and that McKee gave Fulton any consideration therefor.

As regards the note and mortgage, the answer admits substantially that they were written by the defendant, Fulton; that prior to the assignment to the plaintiff they were in the possession of the assignor McKee, and are now in the hands of the plaintiff, the assignee. We admit that these facts if proved on the trial, would raise a presumption of certain other facts; namely, that this note and mortgage were made, executed, and delivered by the defendant, Fulton, to McKee for a valuable consideration. But these latter facts, so far from being admitted by the answer, are both directly and circumstantially denied therein; and the admission is an admission of matters of evidence alone and not of pleading.

Suppose McKee did have the note entrusted to him by Fulton for the purpose of handing to Swain, what was his position with reference to it? Evidently he was but Fulton's bailee, entrusted by Fulton to carry this note to Swain. But the note itself never had any existence in McKee's hands by reason of such possession. The note was never delivered to

him in the proper legal sense of delivery. There was no consideration.

Now, can it be seriously contended that these facts could not be given in evidence under the general denial? What is the legal tendency of the facts, admitting that they have any? Evidently to establish: 1st, that the note was not delivered to McKee; 2d, that McKee never gave any consideration for it. But these two facts of delivery and consideration constitute McKee's *prima facie* case, and all of his *prima facie* case as alleged in the complaint; so that the legal tendency of all that is stated in the answer relative to McKee's possession of this note, is simply to contradict the two facts which constitute our *prima facie* case, which two facts are distinctly asserted in the complaint.

Suppose that the plaintiff had as a matter of fact put in a replication, this replication would clearly be but a re-iteration by the latter \*of his positive, direct allegations in the complaint. [432] If it is true as he says in the complaint that this note was given to him for one purpose and for a good consideration, it follows necessarily that it was not given him for another purpose, and without consideration. Suppose the plaintiff proves the allegations of the complaint that this note was delivered to him by Fulton for a consideration of three thousand dollars, does he not clearly disprove these facts which it is pretended constitute new matter? Does he not prove that the note was not given by Fulton to him to give to Swain to secure a partnership debt? Does he not show that it is false that the note was returned by Swain to McKee, paid and satisfied, and for the purpose of giving it back to Fulton?

*Waller & Moore*, also, for Appellants, argued that the allegations of the answer are not new matter, and cited *Piercy v. Sabin*, 10 Cal. 22; *Glazer v. Clift*, 10 Id. 303; *Bridges v. Hall*, 13 Id. 640; *Schemerhorn v. Allen*, 18 Barb. 29; *Gilbert v. Crane*, 12 How. Pr. R. 455; *Rodde v. Ruckgaber*, 3 Duer, 85; *Brogil v. Isham*, 2 Kernan, 17; *Conger v. Johnson*, 2 Denio, 96; *Brown v. Archer*, 1 Hill, 266; *Van Santvoord's Pl.* 453; 1 *Monell's Pr.* 560.

*Henry B. Janes and Gregory Yale*, for Respondents.

The allegations of the answer were new matter. 1st. By the rule at common law. (1 Chit. Plead. \*507.) 2d. By the provisions of the Practice Act. (Civ. Prac. Act, sec. 46; *Bridges v. Paige*, 13 Cal. 641.) And 3d. By the rule in chancery. According to equity practice, "When the case is heard upon the bill and answer alone, the answer must be taken as true, whether responsive to the bill or not." (2 Dan. Ch. Prac., top page 1021, note 2, commencing on page 1019, and numerous cases cited.) *Dale v. McEvers*, 2 Cowen, 118, Court of Errors, is among the authorities cited.

To avoid the foregoing conclusions, elaborate arguments are filed in support of the proposition: that the matter in this answer, which is relied upon as constituting "new matter," is simply in direct contradiction with two specific material allegations of the \*complaint; that it only amounts to a circumstantial denial of the delivery of this note and mortgage by Fulton to McKee, and that McKee gave Fulton any consideration therefor.

The error in this proposition is that it entirely mistakes the defense set up in the answer. The allegations of the answer are not a denial of the consideration and delivery of this note and mortgage, but that facts arose subsequently to their execution and delivery which avoid their effect, and discharge them, which facts are specifically pleaded and not put in issue by plaintiff.

From the averments of the answer it appears that the indebtedness to be secured was (as between Fulton & McKee) an individual liability of McKee, but Fulton was also liable for it as a member of the firm of McKee & Co.

Fulton assumed this indebtedness of McKee's, upon the agreement by McKee to release him, Fulton, from the terms of a contract then subsisting and in operation between them; in other words, instead of repaying the advances of money which McKee was then making to him, he, Fulton, might repay such advances in the value of this note and mortgage to the extent of three thousand dollars, i. e., the note and mortgage were accepted as a substitute for such purchases, Fulton being released from his contract of partnership to that extent. The creditor of the firm offered a forbearance upon the indebtedness to them, which was accepted by Fulton & McKee.

Monell says: "Under it (the general issue) the plaintiff may show anything which goes to establish that at the commencement of the suit, the plaintiff had no subsisting cause of action. These facts, which may thus be shown, must have existed, at the time the contract was made, or the alleged cause of action arose, for if they arose subsequently, it is new matter, and must be specially pleaded." (1 Monell's Practice, 564.)

Allegations in the pleadings made subsequent to the declaration, and which do not go in denial of what is before alleged, are new matter. (Gould Pl. 3, sec. 195; Chitty's Pl. 538.) When the defendant seeks to introduce into the case a defense which is not disclosed by the pleadings, it is new matter. (*Bridges v. Paige*, 13 Cal. 641.) A defense which concedes that plaintiff once had a \*cause of [434] action, but insists that it no longer exists, is new matter. (*Piercy v. Sabin*, 10 Cal. 27.)

NORTON, J. delivered the opinion of the Court—FIELD, C. J. and COPE, J. concurring.

This is an action to recover the amount of a promissory note, and to foreclose a mortgage given as security. The complaint alleges that the defendant, Fulton, being indebted to Redick McKee in the sum of \$3,000, made a promissory note for that sum, dated July 3d, 1856, and payable to said McKee, or order, six months from date, and delivered the same to the said McKee, who then and there became the legal owner and holder thereof, whereby the said defendant became liable to pay the same to the said McKee, or to his order, according to the tenor and effect of the said note; that a mortgage was executed and delivered as collateral to the note; that on the fifteenth day of March, 1860, the said McKee, being still the owner and holder of said note and mortgage, and the money remaining due and unpaid, the said McKee, for value, sold and assigned said note and mortgage to the plaintiff.

Fulton, by answer, denies that he was indebted to McKee in any sum; and denies that being indebted he made the said note; and denies that McKee ever was the legal owner or holder of the said note, "except as hereinafter stated;" and

denies that he became liable to pay said note to McKee or his order; and denies that on the fifteenth day of March, 1860, McKee was the owner or holder of said note, or that there was anything due on said note; and denies, upon information and belief, that plaintiff paid value for the pretended assignment; and denies that the plaintiff, by virtue of said pretended assignment, became the owner or holder of said note; and denies that the amount of the said note remains due or unpaid, or that he is justly indebted thereon to the plaintiff. And then the answer proceeds: "Further answering, he says," stating in substance that he, Fulton, made the note and mortgage at the request of McKee, to be placed by McKee in the hands of one Swain as security against certain debts due by McKee and Fulton, and to be returned to him, Fulton, when these debts were paid; that these debts having been subsequently paid, he ap-  
[435] plied to \*McKee to have the note returned and the mortgage canceled, and that in pursuance of such application McKee procured Swain to redeliver to him the note, and execute a satisfaction piece of the mortgage; and that he, Fulton, supposed said note and mortgage had been duly canceled by McKee, until several years after, when he learned that McKee had omitted to cancel them.

There was a separate answer, setting up a counter claim, and answers by some other defendants.

The answers of Fulton were filed on the tenth day of September, 1860, and on the fifteenth day of the same month a stipulation was made between the parties, containing, besides other matter, the following: "And it is further stipulated and agreed that this action be referred to Lewis Aldrich, Esq., to try all the issues, and to report a judgment thereon, the cause being now at issue upon the complaint and answer on file, and to be tried thereon."

When the action came on to be tried before the referee, he decided that there being no replication filed, the special affirmative matters set forth in the answer of Fulton must be deemed to be admitted, and did not require to be proved, and that as they constituted a defense he was entitled to judgment, which was accordingly reported in his favor.

On this appeal the plaintiff insists:



1st. That the affirmative matters set forth in the answer of Fulton are not "new matter."

2d. If they are to be treated as new matter, a replication was waived, and an issue joined upon them by operation of the stipulation.

Section forty-six of the Civil Practice Act provides that the answer shall contain: first, a denial of the allegations of the complaint; second, a statement of any new matter or counter claim constituting a defense. The denial and the new matter are thus treated as different defenses. If what is claimed as new matter is in effect only a denial of the allegations of the claimant, it is not new matter within the meaning of the Practice Act. The circumstance that the answer consists of affirmative allegations, instead of a direct negative of the allegations of the complaint, does not determine that it consists of new matter. Thus, in the case of *Frisch*\*v. [436] *Caler*, (ante 71,) recently decided by this Court, an answer averring payment of the promissory note, which was the cause of action, was held not to be new matter; because, although it was an affirmative allegation, its effect was only a denial of an essential allegation of the complaint, to wit, the non-payment of the note. The Court says: "Whether matter is new or not must be determined by the matter itself, and not by the form in which it is pleaded, the test being whether it operates as a traverse or by way of confession and avoidance." If the answer, either directly or by necessary implication, admits the truth of all the essential allegations of the complaint which show a cause of action, but sets forth facts from which it results that, notwithstanding the truth of the allegations of the complaint, no cause of action existed in the plaintiff at the time the action was brought, those facts are new matter. But if those facts only show that some essential allegation of the complaint is not true, then such facts are not new matter, but only a traverse. In the case of *Gilbert v. Cram*, 12 How. Pr. R. 455, the complaint averred a sale of goods, and that the defendant "*is now indebted to the plaintiffs*" therefor. The answer averred that the sale was upon a credit of six months, and that the credit had not expired. It was held that the answer did not contain new matter, the facts only amounting to a denial of the allegation in

the complaint that the defendant is now indebted. (See, also, the cases of *Stoddard v. Onondago Annual Conference*, 12 Barb. 573; *Sawyer v. Warner*, 15 Id. 282; *Conger v. Johnson*, 2 Denio, 96; *Brown v. Archer*, 1 Hill, 266.)

In this case, the note was transferred to the plaintiff several years after it was by its terms payable. The plaintiff, therefore, has no other cause of action than such as McKee had, and the complaint necessarily avers a cause of action in McKee on the note. The facts set up in the answer show that McKee never had a cause of action against Fulton on the note. They do not, directly or impliedly, admit that McKee ever had a cause of action. The note was not delivered to him as a valid instrument that could be enforced by him. Nothing occurred after the note was placed in McKee's hands to give him a right of action upon it, and nothing has occurred to discharge such a right of action, if it ever [437] existed. \*For anything alleged in the answer, if

McKee ever had a right of action on the note, he or his assignee has it still. The complaint alleges that Fulton, for value received, promised to pay McKee \$3,000. This allegation shows the cause of action, and was indispensable to be alleged. The facts set up in the answer show that this allegation is not true, and this is all they show. The answer, therefore, is a traverse, and not a confession and avoidance.

The error which has occurred in this case has, perhaps, arisen from considering that the note, when produced, would alone prove a cause of action, and that hence an answer which impliedly admitted the signing of the note, and placing it in the hands of the person to whom it was by its terms payable, confesses a cause of action. But the note is only *evidence* of the fact of delivery. It is not conclusive. Under an issue formed by a direct denial of delivery, the note in the hands of the plaintiff would prove his case; but the defendant, under his denial, would be at liberty to show that it came to the plaintiff's hands in some other way than by delivery to him as a valid contract. In other words, the defendant could prove, under a direct denial of the plaintiff's allegation of delivery for value, the very facts that he has specially set up in his answer.

The counsel in their arguments have treated the special

matter set forth in Fulton's answer as constituting a defense separate from the denials by which it is preceded. In fact, the denials and special matter are pleaded as parts of one defense, the special matter being nothing more than an explanation of the preceding denials, and showing how it occurred that the note was made, and placed in McKee's hands without having been delivered as a contract. We have not treated this circumstance as material, and have considered the effect of the special matter as if it had been set up as a separate defense; but it indicates that the pleader, when interposing his answer, understood the law of pleading, in this particular, as we have found it to be.

We conclude, therefore, that the special matters set up in the answer of Fulton were not new matter within the meaning of the Civil Practice Act, and did not require a replication to prevent their being taken as true, and deemed proved at the trial.

\*Our determination upon this point renders it unnecessary to consider the effect of the stipulation. [438]

Judgment reversed, and cause remanded for a new trial.

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### DUTIL v. PACHECO *et al.*\*

**CONCURRENT JURISDICTION IN LAW AND EQUITY.**—Where Courts of Law and Equity have concurrent jurisdiction, if a Court of Law has first acquired jurisdiction, and decided a case, a Court of Equity will not interfere to set aside the judgment, unless the party has been prevented, by some fraud or accident, from availing himself of the defense, at law.

**JUDGMENT AGAINST SHERIFF CONCLUSIVE ON INDEMNIFIER.**—The provision of the Practice Act making the judgment, in an action against a Sheriff, conclusive evidence against his indemnifier, where the latter has been notified of the action, is founded upon the principle that the action, under such circumstances, is in substance against the indemnifier—the real party in interest—and that he has in that action an opportunity to make any defense that may exist.

**EDEM—EQUITY WILL NOT SET ASIDE.**—Where, therefore, the indemnifier has been notified of the action against the Sheriff, he cannot maintain a bill in equity to set aside the judgment obtained therein, except under such conditions as would have enabled him to maintain it had he been the nominal as well as real party defendant to the first action.

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\*Cited in *Sampson v. Ohleyer*, 22 Cal. 209. See 51 N. H. 245.

APPEAL from the Seventh Judicial District.

The facts are stated in the opinion.

*H. Allen*, for Appellant.

The judgment of *Pacheco v. Hunsacker*, the Sheriff, which the plaintiff seeks to annul, is an instrument of evidence, which Hunsacker, the Sheriff, may use against the appellant in an action, or in a summary proceeding, upon the appellant's bond of indemnity. (Wood's Dig. 247, art. 1370.)

The appellant may sustain this action because he fears some future probable injury to his rights or interests. (2 Story's Eq. Jur. secs. 700, 825, 826; *Winchester v. Evans*, 3 Hez. 305, 316.) It is a settled doctrine of equity jurisprudence that an instrument of evidence may be annulled and canceled on the ground of fraud. (2 Story's Eq. [439] Jur. secs. 614, 695, 695a; *Crawford v. Crawford*, 4 Desau, 176; *Lowe v. Blake*, 3 Id. 268; *Hamilton v. Cummings*, 1 Johns. Ch. 516.) The instrument will be set aside and canceled, though the appellant is not a party to it. (*Prentice v. Achorn*, 1 Paige, 30.) The instrument will be canceled, although Hunsacker, the party who may use it as evidence, be entirely innocent of any fraud. (*Huguerine v. Basley*, 14 Ves. 289, 290; *Bridgman v. Green*, 5 Id. 627; 1 Dow, 30; *Bennet v. Wade*, Dick. 84; *Davidson v. Russel*, Id. 761; *Shepherd's Touchstone*, 66, 67.) The appellant being a *bona fide* creditor of the defendant, Andegue, may attack his transfer of the wheat to Pacheco as fraudulent. (*Coke v. Honison*, 6 Munf. 184; *Hildreth v. Sands*, 2 Johns. Ch. 40.)

A judgment at law may be investigated in a Court of Equity, and if rendered upon a fraudulent bill of sale, or upon any other fraudulent instrument, such judgment will be declared a nullity and canceled. (*Lowe v. Blake*, 3 Desau, 268, 270; *Crawford v. Crawford*, 4 Id. 176; *Webster v. Wise*, 1 Paige, 319; *West v. Logwood*, 6 Munf. 491; *Bynum v. Sledge*, 1 Stew. & Port.; *Bennet v. Singleton*, 3 J. J. Marsh, 707; *Kruson v. Kruson*, 1 Bibb, 183; *Collins v. Lee*, 2 Mis. 16.)

An obligor in a bond given to a Sheriff to indemnify him against the claimant of the property levied on is not concluded by a judgment of the claimant against the Sheriff, but only

by judgment in an action on the bond. (*Gist v. Davis*, 2 Hill's Ch. 335.)

One not a party to a judgment is not bound by it, either in law or equity, merely because he was present and cross-examined the witnesses. (*Turpin v. Thomas*, 2 Hen. & M. 139; *Hurst's Lessee v. McNeil*, 1 Wash. C. C. 70, 75.)

Where a Sheriff levies a *fi. fa.* on property claimed by a stranger, and the claimant brings trespass against the Sheriff, and recovers judgment, equity will give relief against the judgment, where the ownership of the claimant is founded in fraud. (*Lewis v. Wyatt*, 2 Rand. 114.)

*M. S. Chase*, for Respondents.

The bill discloses no ground for relief. (*White v. Pratt*, 13 Cal. 521.) The judgment, affirmed by this Court in *Pacheco v. \*Hunsacker*, 14 Cal. 120, either con- [440] cludes appellant or it does not affect him. If admissible at all, then as a plea it was a bar, and as evidence conclusive as to the measure of damages in suit upon the bond of indemnity to the Sheriff. (*White v. Pratt*, *supra*; *Riddle v. Baker*, 13 Cal. 295.) But if not conclusive, then this judgment in law is not admissible in evidence, and the appellant has no cause whatever to fear it. (*Pico v. Webster*, 14 Cal. 204.)

The bill at bar shows the appellant to have been the real party in interest defending in the action at law, while the pleadings show full defense made by him in every stage of that action, upon notice of its pendency given him by the Sheriff, Hunsacker. In such a case our statute has provided that "the judgment recovered therein shall be conclusive evidence of his [the Sheriff's] right to recover" on the indemnity bond. (Pr. Act, sec. 645.) "To authorize relief in equity, it must be a case where it is impossible for the party to make an effectual defense at law." (*Dilly v. Barnard*, 8 Gill & Johns. 170; *Truly v. Manson*, 5 How. U. S. S. C. 141.) The appellant had perfect right and full opportunity to make defense to the action at law against the Sheriff. As the Sheriff's indemnifier and the real party in interest, he could have intervened for himself, and become not only (as he did) privy to the action, but a party to the record. (Pr. Act, sec.

659.) "Fraud in a contract may be set up at law as well as in equity, and equity will not relieve against a judgment on that ground." (*Allen v. Hopson*, 1 Freeman, 276.) "A Court of Equity will not enjoin a party from pursuing a judgment at law upon any ground which afforded a good defense at law, unless he shows some good reason for not making the defense—as that he was prevented by accident, surprise, or mistake, or by the fraud of the opposite party, without his own fault or neglect." (*Warton v. Woods*, 22 Wend. 520.) The appellant's bill neither discloses, nor pretends to disclose, any such state of facts, nor does it appear, on the bill that the same facts, the same alleged *indicia* of fraud, and by the same witnesses, were not developed in the several trials in the Court below, and by this very appellant, too, as are now paraded in this bill. "Where the Court [of Equity] has concurrent jurisdiction with the Courts of Law, a judgment obtained without fraud or undue means will have the [441] \*same effect in a Court of Equity, as to a reëxamination of the same question, as it would have in a Court of Law." (*Orcutt v. Armes*, 3 Paige Ch. 459.)

"Courts of Law have concurrent jurisdiction with Courts of Equity in matters of fraud; but where a cause has been once determined at law equity will not take cognizance of it, unless there be some equitable circumstances of which the party could not avail himself at law to give jurisdiction." (*Smith v. McIver*, 9 Wheat. 532.) But treating the question of the ownership of the wheat as one of law alone, it is sufficient to say that it has been solemnly adjudicated upon and settled; and "where the Court has deliberately examined and settled a legal question in one suit, it will not afterwards listen to an argument of the same question, although it arises in another suit between different parties." (*Teal v. Woodworth*, 3 Paige, Ch. 470.)

While if the ownership be considered as a question of fact, and that question becomes definitely settled by a competent Court, it would seem equally inequitable to permit the real party in interest in that litigation to reagitate that question in a bill for new trial, which wholly fails to charge a fact, or circumstance, or any *indicia*, which were not cognizable by, or shown in, the former trial, or that any evidence what-

ever as to any of the facts has since been discovered which was not accessible to him then.

"If suit be first brought at law, in which the question of fraud may be tried, the party injured by the fraud must set it up there, and if he neglects to do so, equity will not relieve him." (*Haydon v. Gordon*, 7 Leigh. 157.)

NORTON, J. delivered the opinion of the Court—FIELD, C. J. and COPE, J. concurring.

This is an action in the nature of a bill in equity to set aside a judgment recovered by Pacheco against Hunsacker, who, as Sheriff, seized and sold certain personal property of Pacheco under an execution in favor of Dutil against Andegue. Dutil claims the right to maintain this action, on the ground that he indemnified the Sheriff against damages for taking said property.

It appears by the pleadings that when the action by Pacheco \*against Hunsacker was commenced, the [442] latter gave Dutil notice of the action, and that Dutil took charge of the defense, and, by his own attorneys, defended the action from the commencement to the conclusion.

Under such circumstances, the judgment against the Sheriff was conclusive evidence of his right to recover against Dutil on the bond of indemnity, by the provisions of section six hundred and forty-five of the Civil Practice Act. By virtue of section six hundred and fifty-nine, Dutil might have intervened, and defended as a party to the record, as he did as a party in interest in the name of the defendant on the record.

The alleged fraud in the sale of the property by Andegue to Pacheco, which is the basis of the present action, might have been litigated in that action, and would, if proved, have defeated the action.

Where Courts of Law and Equity have concurrent jurisdiction, if a Court of Law has first acquired jurisdiction, and decided a case, a Court of Equity will not interfere to set aside the judgment, unless the party has been prevented by some fraud or accident from availing himself of the defense at law. (*Truly v. Manson*, 5 How. U. S. 141; *Allen v. Hopson*, 1 Freeman, 276; *Warton v. Wood*, 22 Wend. 524; *Smith v. McIver*. 9 Wheat. 532; *Haydon v. Gordon*, 17 Leigh. 157.)

The provision of the Civil Practice Act making the judgment conclusive evidence against the indemnifier, when he has been notified of the action, is founded upon the principle that, under such circumstances, the action is in substance against the indemnifier—the real party in interest—and that he has in that action an opportunity to make any defense that may exist.

Supposing, then, the facts alleged in regard to the action at law, and the notice to Dutil, and his participation in the defense, to have been satisfactorily established, and this must be presumed in support of the decree, nothing to the contrary appearing in the record, we think the decree dismissing the action was proper.

Judgment affirmed.

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[443]

\*GREGORY v. HAYNES *et al.*<sup>1</sup>

**SUGGESTION OF DEATH AND SUBSTITUTION OF EXECUTOR.**—Where the plaintiff in an action died before trial, and a subsequent order for judgment contained a recital as follows, "This action having been continued in consequence of the death of the plaintiff, by his executor, Samuel Webb, and the jury having found a verdict for plaintiff," and then awarded judgment in favor of the plaintiff: *Held*, that the recital sufficiently showed a suggestion of the death of the original plaintiff and a continuance or revival of the cause in the name of the executor.

**CONTINUANCE OF NAME OF DECEASED DOES NOT AVOID THE JUDGMENT.**—The continuance of the name of a deceased plaintiff instead of that of his executor, in a judgment rendered after the substitution, is an error of form only, and does not make the judgment void.

**SETTING ASIDE JUDGMENT ON TERMS.**—Where a motion to set aside a judgment is granted "on payment of all costs," the judgment remains in force until the costs are paid.

**COSTS.**—A failure by the opposing party to file his cost bill, or to give notice under a rule of Court allowing five days after notice for payment of the costs, would not operate to make the vacation of the judgment absolute.

**CONDITIONAL ORDER, EFFECT OF.**—After a conditional order to set aside a judgment, the Court in deciding a motion to place the cause on the calendar for trial, "orders that said motion be and the same is hereby denied, and the judgment will remain:" *Held*, that this was a distinct adjudication, that the previous order had not taken effect; and held further, that this order directing that the judgment remain, being the last in the case and not having been appealed from, it deprived of all force any previous order in reference to vacating the judgment.

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<sup>1</sup> Affirmed in *Haynes v. Calderwood*, 23 Cal. 410



## APPEAL from the Twelfth Judicial District.

The facts are sufficiently stated in the opinion.

*John Gregory*, Appellant, *in pro. per.*

A judgment on a verdict can only be entered up after the death of a party in a case where the death occurred after verdict, and all the common law authorities are to the effect that a judgment or decision entered in the name, favor, and title of a dead party is void. "A judgment rendered without jurisdiction can be attacked directly or collaterally," (in any stage of the proceedings.) *Whitewell v. Barbier*, 7 Cal. 54; *Dorente v. Sullivan*, Id. 279; *Alderson v. Bell*, 9 Id. 375.

The recital in the judgment cannot be taken as the proper record evidence of the death of the plaintiff and substitution of his representative. How or where the Court obtained a knowledge of the fact of Wenborn's death does not appear from the record, nor does \*it appear how the [444] Court came to know that Samuel Webb was Wenborn's executor at all; nor how the Court came to know that the action had been continued after Wenborn's death by the executor in the name of the deceased Wenborn. Probably the Judge obtained information of these matters outside of the Court, and it is fair to presume so; and that accounts for their not appearing on the minutes or record of the Court, and for this recital not stating the necessary fact, as required by section sixteen of the Practice Act, that the action was continued on motion and by leave of the Court.

The order granting a new trial on payment of costs became absolute by the failure to file a bill of costs and give notice. The rule of Court in force at that time provided that where relief was granted upon payment of costs, the party had five days to comply with the order after service of notice. No bill of costs or notice under this order was ever served, and the cause stands so to this day.

"Where proceedings in a cause are set aside on payment of costs, the party is not bound to pay costs until a taxed bill is presented." (2 Wend. 293.) "Until this is done, the whole matter is in *fieri*." So it was when this order was made, and so continues to be until the plaintiff in that suit

chooses to move it on, by serving his bill of costs. The position of the case was not altered by the expression in a subsequent order that the "judgment will remain."

This order should be interpreted by common sense and justice. It cannot be supposed that that Court intended to dispose of a matter which was not before them. The motion was simply to reinstate the cause on the calendar, and that was the only question. The language of a judgment or order must be interpreted by the issues to be disposed of, and looked on in this light, this order simply means that the order previously made was to stand. The Clerk in making the entry has called the previous order a judgment, but it clearly means the previous order, and calling it a judgment cannot be construed to take away the defendant's rights. If we construe it as meaning the judgment, it merely leaves it in *status quo*. It was to remain, but how? Why, of course, precisely as it then stood; that is, with a new trial granted upon terms.

[445] \**Robert C. & Daniel Rogers*, for Respondents.

The condition of granting the new trial in case of *Wenborn v. Boston* was the payment of all the costs, which was not complied with, the costs never having been paid. It was a condition precedent, and therefore the judgment stands as it was originally entered. But to remove any doubt, as it were, upon the point, the Court in denying the defendant's subsequent motion made the further order, that the judgment should remain as it was originally entered—valid and effectual—by which the rights of the respective parties were fully and finally determined. This last order renders unnecessary any discussion of the effect of a failure to file a cost bill or give notice under the rule of the Court. If defendants were dissatisfied with it they had their right of appeal, which they did not pursue.

NORTON, J. delivered the opinion of the Court—FIELD, C. J. and COPE, J. concurring.

This is an action of ejectment in which the plaintiff de-rains a title by a grant from the Pueblo of San Francisco and sundry mesne conveyances to one Sarah Boston, and by a deed from her and her husband, dated June 3d, 1854, to

David Calderwood, and by sundry mesne conveyances from Calderwood to the plaintiff.

The defendants claim title under a deed from said Sarah Boston and her husband to one Wenborn, of a date prior to their deed to Calderwood. The deed to Wenborn is claimed to have been executed by one Strathern, under a power of attorney from Sarah Boston and her husband, but which being lost, an action was instituted by Wenborn against Sarah Boston and her husband to quiet his title, in which a judgment was rendered in favor of the plaintiff.

Whether this judgment was valid when pronounced and is still in force, are the only material questions in the case.

The objection urged to the validity of the judgment is, that the plaintiff, Wenborn, had died before the trial and verdict, but that the proceedings were continued and judgment entered in his name as plaintiff. It appears, however, that after the trial the Court made a judgment or order with this recital, to wit: "This action having been continued in consequence of the death of plaintiff, by \*his executor, [446] Samuel Webb, and the jury having found a verdict for the plaintiff," and then judgment is awarded in favor of the plaintiff. Another judgment appears subsequent in order, but of the same date, in favor of the plaintiff, and both judgments are entitled in the name of Wenborn as plaintiff. This judgment was before this Court in the case of *Gregory v. Haynes*, reported in 13th Cal. 591, when it was decided to be a valid judgment in favor of Webb as executor of Wenborn. The Court say: "We think this recital clearly shows, whether with formality or not, the suggestion of the death of the original plaintiff, and a continuance of the cause or a revival of it in the name of the executor. If there was any irregularity in all this, it cannot be corrected in this collateral way." The continuing the name of Wenborn, instead of inserting that of Webb, executor, as plaintiff, in the title of the judgment or order in which this recital is contained, and also in the more formal judgment, was an error of form, not rendering the judgment void. The judgment was therefore effectual to quiet the title of Webb, as executor of the will of Wenborn, against the defendants Sarah Boston and her husband. This action was commenced and a notice of *lis pendens* filed before

the conveyance of Sarah Boston and her husband to Calderwood, and the judgment was binding upon him and those claiming under him.

It is claimed by the plaintiff that the judgment pronounced in the action brought by Wenborn against Sarah Boston and her husband is not now in force, because it was vacated by an order of the Court by which it was rendered on the eleventh day of November, 1854. The order is in these words: "In this Court the motion on the part of the defendants to open the default, and for leave to said defendants to answer, heretofore argued and submitted. The Court, after due deliberation thereon, orders that said motion be and the same is hereby granted on the payment of all costs." Read literally, this order could have no application. There had been no default, and there was no occasion for leave to file an answer, as there was an answer on file. But, treating it as an order to set aside the judgment, it appears never to have taken effect. It was granted upon the condition of payment of all the costs. It does not appear, nor is it claimed, that [447] any costs were ever paid. To obviate \*this difficulty, it is said that there were no costs because the bill of costs was not filed within the allowed time after verdict. It is not necessary to determine whether the particular sum of costs which were specified in the judgment was properly inserted. If the bill of costs was not filed in due time, the Court might have intended that this circumstance should be disregarded and these costs paid as a ground of relief. It is not a question whether these costs should be considered as a part of the judgment, but whether they should be paid as a condition that the judgment should be vacated. But if this particular bill of costs was not to be paid, certainly it was the intent of the order only to give relief upon payment of the costs actually incurred. No costs were paid or tendered. It is also said that by the fourteenth rule of that Court, where the payment of costs is imposed as a condition of granting any relief, the party upon whom the terms are imposed has five days after notice to comply therewith, and that no notice having been served, the time to pay the costs never has run out, and that the judgment stands vacated. Whatever steps this rule may require to be taken in order to obtain any relief

intended to be granted, it would be unreasonable to hold that the judgment became vacated upon the instant the order was made. To give this effect to the order would render the condition of payment of costs altogether inoperative, because if the judgment became instantly vacated, it would remain vacated, although notice should be given and the costs not paid. The judgment would not come into existence again upon the default of payment.

But the Court in which the judgment was rendered has given its own interpretation of this order and this rule of practice. Upon application of the defendants in that action, an order was made on the ninth day of June, 1856, that the cause be put upon the calendar for trial, but this was also upon payment of costs. Two days afterwards this order was vacated by consent of both parties, and the "cause" put on the calendar of Saturday for argument. The argument mentioned was apparently of a motion to put the case on the trial calendar, upon the ground that the judgment had been set aside, since, on the twentieth of the same month, on deciding a motion to place the cause on the calendar for trial, the Court \* "orders that said motion be and the same [448] is hereby denied, and the judgment will remain."

This was the last order made in the case, and it is a distinct adjudication by the Court in which the judgment was rendered that the order to set aside the judgment (if such is the meaning of the order of the eleventh November, 1854) had not taken effect. It was the decision of the Court as to the proper meaning and application of its order and rule of practice. If we were authorized to decide differently from that Court upon such a matter, we see no reason for deciding differently in this case. At any rate, the order of June twentieth "that the judgment remain," not having been vacated or appealed from, must have the effect to deprive the order of November eleventh of any effect.

The judgment must be affirmed.

WOODWARD v. LAZAR *et al.*

**TRADE MARK WILL BE PROTECTED.**—The name established for a hotel is a trade mark, in which the proprietor has a valuable interest, which a Court of Equity will protect against infringement.

**NAME OF BUILDING NOT A FIXTURE.**—A tenant, by giving a particular name to a building, as a sign of the hotel business, for which he uses it, does not thereby make the name a fixture of the building, and the property of the landlord upon the expiration of the lease.

**TRADE MARK OF HOTEL.**—W. leased a lot of land, on which he erected a building, in San Francisco, and used it as a hotel, to which he gave the name of "What Cheer House." Before the lease expired, he purchased an adjoining lot, upon which he erected a large building, and for a time occupied both buildings as the "What Cheer House," the principal sign being removed to the one last built. He soon after surrendered the leased lot, with the building which was on it, and continued the business, under the same name, entirely in the building which he had erected on the lot he had purchased. Two months afterwards, the defendants, having purchased the first mentioned lot and building, opened there a hotel, under the name of "The Original What Cheer House"—the word "original" being painted on the sign in small letters, and in a manner calculated to deceive the public into the supposition that it was the same name. In an action by W. against defendants, to restrain them from using the name of "What Cheer House" for their hotel: *Held*, that plaintiff was entitled to the relief sought, and that defendants should be enjoined from the use of the name.

APPEAL from the Fourth Judicial District.

[449] \*The facts are stated in the opinion.

*Delos Lake*, for Appellants.

Plaintiff's right to relief is claimed on the general principles that recognize the right of property in a trade mark, and the question is whether it can fairly be brought within those principles. We say it cannot. The legal right and adjudged cases proceed solely on the ground of a valuable interest acquired in the goodwill of the trade or business, and that having appropriated a particular label, or sign, or trade mark, indicating that the article is of a certain person's manufacture, or sold by him, or by his authority, he is entitled to protection against any other person who attempts, by fraudulent and false imitations, to pirate upon the goodwill of the friends, or customers, or patrons, of the person whose business or goods have become known by his trade mark. (Willard's Equity, 206.)

Judge Story states the rule thus: "An injunction will be granted to prevent the use of names, marks, letters, or other

<sup>1</sup> Cited 122 Mass. 151.

*indicia* of a tradesman, by which to pass off goods to purchasers as the manufacture of that tradesman, when they are not so." (Story's Eq. Jur. sec. 951.)

At the foundation of the whole principle is the idea of falsehood. If a person appropriate certain signs, symbols, and marks, so that they become well known to the public, to all who see these exhibitions they are a declaration to the effect that the articles to which such marks are in any way attached are the property, manufacture, or business of such person. For any other person to use or appropriate them in like business would be to declare, as plainly as direct words could declare, that the property or business was the property or business of the person whose symbols or marks were used.

Now how can this principle be applied to a name by which a building has been long known and used as a hotel? The name belongs to the building, and not especially to the business. In the very nature of the case it is not transferable. The public know the place by the name. To name a hotel the "What Cheer House," "Washington," "Jackson," "Astor," or "Irving House," is only to declare, after the name shall become known, the locality of the \*house, and not who is the proprietor; and, there- [450] fore, it is no falsehood or deception for a tenant or owner who succeeds to the occupancy to retain the name by which the building is already known, because he does not thereby affirm that the former tenant carries on the business. That there is an advantage in succeeding a tenant who has established for the house a business character may be true, and doubtless is so, in many instances; but that is an accidental benefit, which no Court can prevent. It is, however, precisely what the Court in this case is asked to prevent.

*S. Heydenfeldt*, for Respondents.

Courts of Equity will protect a party in the use of a trade mark, label, or sign, and where they are simulated, so as to deceive customers, the piracy will be checked by injunction. (*Patridge v. Menck*, 2 Barb. Ch. 101; *Knott v. Morgan*, 2 Kien, E. C. R., 219; *Taylor v. Carpenter*, 11 Paige, 292; *Stokes v. Landjroye*, 17 Barb. 608, and cases there cited; *Coats v. Holbrook*, 2 Sandf. Ch. 586, and cases there cited.)

A similar case to the one at bar is *Howard v. Henriques*, 3 Sand. S. C. 725. (See, also, *Lewis v. Langdon*, 7 Sim. 421; *Hogg v. Kirby*, 2 Ves. 226.) Even partial and colorable differences will not protect the piracy. (*Clark v. Clark*, 25 Barb. 77; *Brooklyn, White & Co. v. Masury*, Id. 406.) The principle is stated with distinctness by Judge Story. (2 Story's Eq. Jur. 951.)

NORTON, J. delivered the opinion of the Court—COPE, J. concurring.

This is an appeal from an order granting and an order refusing to dissolve an injunction by which the defendants are restrained from using the name of "What Cheer House" as the title or name of a hotel in the city of San Francisco.

Woodward, being the lessee of a lot of land, erected upon it a building, which he occupied as a hotel, and to which he gave the name of the "What Cheer House." Before the expiration of his lease, he purchased an adjoining lot, upon which he erected a larger building, and for a time occupied both buildings as the "What Cheer House," the principal sign being removed from the first and \*placed [451] upon the second building. In November, 1860, he surrendered the leased premises, with the building he had erected on them, to the owners of the land, but continued to carry on the business of the "What Cheer House" in the building he had erected on the lot he had purchased. In January, 1861, the defendants purchased from the owners of the first mentioned lot and building, and opened there a hotel, under the name of the "Original What Cheer House"—the word "original" being painted on the sign in smaller letters than the residue of the title, and disposed in such manner that it was calculated to deceive the public into the supposition that it was the same name.

It has been decided, and with good reason, that the name established for a hotel is a trade mark, in which the proprietor has a valuable interest, which a Court of Chancery will protect against infringement. (*Howard v. Henriques*, 3 Sand. S. C. 725.) The point of dispute in the case is as to whom the name "What Cheer House," as a business sign, belongs. The plaintiff claims that it belongs to him, as the keeper of



the hotel, which he continued to conduct under that name after he surrendered the leased premises; while the defendants claim that it is the designation of the building in which the business under that name was first conducted, and became theirs when they became the owners of that building.

The character of the business which the name designates seems to determine that the name pertains to a building, or at least to a business conducted in a particular building, rather than to the calling of the person conducting the business. If a hotel-keeper creates a reputation for his business, it is as the keeper of some particular house at a known location. The "What Cheer House" cannot well be the business designation of a man separate from a house, though the converse may very well be. But conceding that the name of a hotel must pertain to some particular house, or be the trade mark of the person as the keeper of a particular house, it does not follow that the name becomes inseparably connected with the building to which it was first applied. The name is not a "fixture." A person may have a right, interest, or property, in a particular name, which he has given to a particular house, and for which house, under the name given to it, a reputation and good-will may have been [452] acquired; but a tenant, by giving a particular name to a building which he applies to some particular use, as a sign of the business done at that place, does not thereby make the name a fixture to the building, and transfer it irrevocably to the landlord. In this case, it does not appear that the lessee was under obligation to establish any particular business on the demised premises. Doubtless, he might at any time have discontinued the business of a hotel-keeper, and established in its stead the business of a merchant, and for this purpose have discarded the business name he had used for his hotel. And if he could do that, it seems to follow that he might remove from the demised premises, and establish a hotel at another place, and give to it the name he had used at the first locality. This, in effect, is what the plaintiff did. Before surrendering the demised premises, he transferred his business, and the name under which it was conducted, to another building, and then surrendered the demised premises and the building, with no special name, to his landlords. He

had conducted the business under the name of the "What Cheer House," at his new locality, at least from November until January, while the old building remained unoccupied, and before it was opened as a hotel. He had in this time, if he had no other claim, established an exclusive right to the name as the trade mark for his new house. Although, therefore, his claim to protection, so far as his right results from the goodwill acquired for the name while it was applied exclusively to the demised premises may not be sustainable, he is entitled to protection in the exclusive use of the name as proprietor of the new house.

Order affirmed.

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[453] \*HUTTON v. SCHUMAKER *et al.*

<sup>1</sup> POSSESSION OF LAND BY INCLOSURE.—The mere inclosure of a lot with brush fence from two to three feet high, without any other steps being taken to subject the property to any use, is not sufficient evidence of ownership or right of possession in the plaintiff to sustain ejectment against one subsequently entering upon the premises.

<sup>2</sup> POSSESSION—ACTS TO OBTAIN, HOW CONSTRUED.—Per NORTON, J.—What acts done upon land will constitute such a possession as will enable a party to maintain an action of ejectment against one afterward entering, may depend upon the intent with which such acts were done, to be gathered from the acts themselves and other surrounding circumstances.

APPEAL from the Fifteenth Judicial District.

Ejectment to recover a lot in the town of Oroville, one hundred feet front by one hundred and thirty-two feet in depth. The complaint averred ownership and a right to the possession in January, 1859, and no ouster subsequently by the defendants. The answer denied plaintiff's ownership, and averred that defendants and those through whom they claimed, had been the owners and in possession since April,

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<sup>1</sup> Cited as authority in *Polack v. McGrath*, 32 Cal. 20; and see *Cannon v. Union L. Co.*, 38 Cal. 674; *Gastro v. Gill*, 5 Cal. 42; *Brummagin v. Bradshaw*, 39 Cal. 44; *Conroy v. Duane*, Jan. T. 1872 (not reported.)

<sup>2</sup> See note 1, under *Hestres v. Brannan*, ante 423.

1856. On the trial, which was before the Court without a jury, plaintiff proved that in September, 1855, one Lyons, from whom he had since purchased, took up the lot, which was then vacant, and cleared off some brush from it, and put round it a brush fence, some two or three feet in height. The evidence also showed that the fence had one or two gaps in it, and that no other improvements were ever put upon the lot by Lyons or plaintiff, and that they never used the lot for any purpose whatever; that in the spring of 1856 defendants entered, and have since put up valuable improvements on the premises. It was shown that after defendants entered, they were notified by Lyons that he claimed the lot.

On motion of defendants, the Court entered a judgment of nonsuit. Plaintiff moved for a new trial, which was denied, and from this order and the judgment he appeals.

*H. O. & W. H. Beatty*, for Appellant.

*Hereford & Williams*, for Respondents.

\*FIELD, C. J. delivered the opinion of the Court— [454]  
COPE, J. and NORTON, J. concurring.

The plaintiff avers in his complaint that in January, 1859, he was the owner and entitled to the possession of the premises in controversy, and in support of this averment proved on the trial that the parties through whom he traces title, in September, 1855, inclosed the premises with a brush fence from two to three feet in height. No proof was offered that the plaintiff or his grantors ever subjected the premises to any uses whatever; and, on motion of the defendants, the Court ordered a nonsuit.

The mere inclosure of a lot with a fence of this character, without any other steps being taken to subject the property to any use, is not sufficient evidence of ownership or right of possession in the plaintiff to sustain ejectment against one subsequently entering upon the premises. The nonsuit was therefore properly granted.

Judgment affirmed.

NORTON, J.—What acts done upon land will constitute such a possession as will enable a party to maintain an action of

ejectment against one afterwards entering, may depend upon the intent with which such acts were done, to be gathered from the acts themselves and other surrounding circumstances.

To maintain an averment that the plaintiff was the owner and entitled to the possession of the premises in question in January, 1859, he proved that another person, under whom he claimed, had, more than three years before that date, built a brush fence from two to three feet high, and having one or two gaps in it, around the premises. I think it cannot be said that, in the absence of any other proof, it was error in the Court to hold that the proof did not sustain the averment, and, in consequence, to nonsuit the plaintiff.

APRIL TERM, 1863.



REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT,

APRIL TERM, 1863

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HEIRS OF NIETO *v.* CARPENTER.

**DECISION OF SUPREME COURT—LAW OF THE LEASE.**—Although a previous ruling of the Appellate Court upon a point directly made is, as to all subsequent proceedings, a final adjudication, yet when the ruling relates to a matter of fact it can only be invoked where the fact reappears under the same circumstances in which it was originally presented.

**ITEM—WHEN SUPREME COURT NOT BOUND BY ITS DECISION.**—Thus where, on a previous appeal, a document in the Spanish language was construed and its legal effect declared, the decision being based upon an erroneous translation of the instrument, and on a second appeal a different and correct translation was presented: *Held*, that the Appellate Court was not bound by the former decision, so far as it was induced by the inaccuracy of the translation.

**PRESUMPTIONS AS TO MEXICAN GRANTS.**—Presumptions are only indulged to supply the absence of facts. There can be no presumption against ascertained and established facts. The presumption, therefore, of a grant from the long possession of land is repelled and destroyed by the production or proof of the instrument under which the possession was held.

**TITLE BY PRESCRIPTION.**—To establish a prescriptive title under the Spanish law or to constitute a foundation for adverse possession at the common law, the instrument under which the occupant entered and claims the premises must purport in its terms to transfer the title—must be such as would in fact pass the title, had it been executed by the true owner in proper form (with the execution perhaps of

a contract to convey after payment of the consideration) and the occupant [456] must have entered under it in good faith, in the belief that he had a good right to the premises, and with the intention to hold them against the whole world.

**PETITION FOR GRANT.**—A petition presented to a Mexican Governor for the purpose of obtaining a grant of land is no part of the grant. It is only the declaration of the party who made it, or of the party by whose authority it was made, and is open to explanation.

**MEXICAN GRANT.**—The grant is the operative instrument, and the representations made to the Governor cannot control the course or nature of the title. If those representations were in truth erroneous, and the mistake in them affected the grant in any respect, the fact could only be made available by the Government.

**IDEM—CONDITIONS IN.**—A Mexican Governor, in 1843, had authority to remove the restraint upon alienation contained in a condition annexed to a grant of land made by a previous Governor, in 1834.

**IDEM—PARTITION AMONG HEIRS.**—Nieto, under a permission from the Spanish Government, in 1784, to graze his cattle on a tract of land in Los Angeles, took possession of said tract and occupied it until his death in 1804; subsequent to which, his four sons continued the occupation under the same permission, but claimed to be the owners of the premises. In 1832, two of the sons died, both of them leaving widows and one of them five children, surviving. In 1833, the two sons and the widows verbally agreed upon a partition of the premises, and to apply to the Governor of the Department for separate grants to them for the portions received by them respectively on their partition. A partition was accordingly made, and a petition was presented to the Governor representing that in 1784 Gov. Fages had granted the premises to their ancestor, Nieto, and given him the possession thereof, but that the title papers had been misplaced, and asking that separate titles be awarded to them for the several portions received by them on their partition. Upon the petition a decree was made by the Governor, July 27th, 1833, declaring that the parties were owners in fee of the premises and designating the portion falling to each, and directing that juridical possession be given to them. Afterwards, December 21st, 1833, a further decree was made by the Governor directing the execution of the titles, and delivery of juridical possession, and in 1834 the several grants solicited were issued. In the grant to *Josefa Cota*, the widow having the five children, was a recital that she had shown herself entitled to the estate of the deceased Nieto, and the form of the granting clause was a declaration to her of the ownership of the land. Her grant contained the usual conditions annexed to grants in colonization. In 1843, the Governor having released the condition against alienation, she conveyed the land to the defendant. The plaintiffs are the children of Josefa Cota and her husband the son of Nieto, and seek to recover the land upon the ground that a title vested in them on the death of their father as his heirs, which their mother Josefa had no authority to convey. It was shown upon the trial that Nieto never had any title from the Spanish Government, but only a written permission to graze cattle upon the tract of which he took possession: *Held*, 1st, that the presumption of title from the long possession of Nieto and his children was repelled and destroyed by the instrument under which such possession was had; 2d, that by the possession under the written permission no title was acquired by prescription; 3d, that neither by the averments [457] in the petition, nor by any of the recitals in the decrees of the Governor, or in the grant to Josefa was she or the defendant estopped from denying that Nieto and his children had any title to the land; and 4th, that the title remained in the Mexican Government until the decree of concession made by the Governor in 1833, which was followed by the grants of the separate parcels in 1834; and that therefore the plaintiffs had no title, and could not recover.

**APPEAL from the First Judicial District.**



This was an action of ejectment to recover the possession of a tract of land situated in the county of Los Angeles, known by the name of "Santa Gertrudis." The case was before this Court at the April Term of 1857, and is reported in 7 Cal. 527. The judgment in the lower Court was for the defendant; this Court reversed the judgment and remanded the cause for a new trial. On the second trial, judgment was recovered by the plaintiffs, and on appeal of the defendant the case was again before the Court at the July Term, 1858. By the decision then rendered the judgment of the Court below was reversed and that Court directed to enter judgment for the defendant. The following opinion was at the time filed by BURNETT, J.—FIELD, C. J. concurring specially in the judgment, but not in the opinion:

"The main facts of this case are stated in the report found in 7 Cal. 527. The case was retried in the District Court, where the plaintiffs had judgment, and the defendant appealed.

"The only question now to be determined is whether the sale, *as* made by Josefa Cota to the defendant, was authorized by order of Governor Micheltorena.

"That the Governor issued an official document directed to A. F. Coronel, then Alcalde at Los Angeles, and invested with the powers of Judge of the Court of First Instance, and *ex officio* Notary Public, is certain; and that this document directed this officer to authorize Josefa Cota to sell the land is equally clear. But this official order itself having been lost, and no copy preserved, its contents could only be shown by parol testimony. It is proven conclusively that Coronel acted only in the capacity of Notary Public, and that he did not act as Judge of the Court of First Instance.

"We must presume that Governor Micheltorena had before him the title papers, otherwise he could have had no competent evidence \*that Josefa Cota had any interest [458] in the land, or that the heirs of her deceased husband had any title to it. From an inspection of the title papers, he would see that Josefa Cota held the land under the grant, as the widow of her deceased husband, and as the natural guardian of the children. The grant was made to her in this capacity. A grant of a similar character may be found in

the case of *Arguello v. The United States*, 18 How. 542. In that case, the Governor, in his decree of twenty-sixth of November, 1835, declared the ownership to be in the minor heirs of the deceased; and in the grant of the next day he declares José Estrada to be the owner, after having *first* stated that he had petitioned in the name of his wards. So, in this case, the heirs of Nieto were first declared by Governor Figueroa, to be the owners of the property in fee simple, and then states that Josefa Cota was the widow of one of these heirs; and when the grant was afterwards issued, it was issued to Josefa Cota, widow of Don Antonio Maria Nieto.

“We think it clear that the order of Micheltorena was intended to direct a sale of the entire interest of all the parties claiming under the grant. The reasons stated in the order, as given by one of the witnesses, show this. In fact, we can see no reason for any sale of less than the full title. Under the circumstances then existing, the Governor could not have intended anything less than a sale of the full property. We must presume, also, that Governor Micheltorena knew the full effect of the title papers, and of the order given by him. We must also presume that the officer to whom the order was directed did his duty in carrying it out. As Governor Figueroa had the right to bind the heirs of Manuel Nieto, in making the partition between them in 1833, so Micheltorena had the power to bind the heirs of Antonio Maria Nieto, by directing a sale of their property in 1843. And there was just as much reason for Micheltorena to decree the sale as for Figueroa to decree a partition. In both cases the acts were direct and simple, and accomplished the end intended in the most expeditious manner. As it was necessary, in *any* view of the matter, to procure the order of the Governor, it was most natural and proper that he should at once grant a full power of sale, without requiring the widow to incur the expense and delay of regular judicial proceedings. All the facts and circumstances of the case satisfy us that the only thing left for Coronel to do was the act of a Notary in properly executing the instrument of sale.

“Our conclusion is, that the sale made by Josefa Cota to the defendant was just and fair, under the then existing cir-

cumstances; that it was authorized by the order of Governor Micheltorena, and should not now be disturbed.

"Judgment reversed, and the Court below will render judgment for defendant."

A rehearing was subsequently granted, and the case was reargued at the October Term of 1859, when the previous decision of the Court on the second appeal was affirmed. The defendant having in the meantime died, the Court directed its judgment to be entered as of the July Term, 1858, *nunc pro tunc*. No opinion was rendered on the reaffirmance of the previous decision, but the Justices stated at the time that so soon as the pressure of other business would permit they would prepare and file one in the case. In pursuance of this statement an opinion was filed at the present term. By stipulation between the parties, the record on the first appeal, and the record on the present appeal, can both be referred to and treated as constituting but one record, and as filed on the present appeal

*Brent, Saunders, and Heydenfeldt*, for Plaintiffs and Respondents.

I. The decision of the Court in this case, on the first appeal, has settled the question whether or not Manuel Nieto, the ancestor of the plaintiffs, had received from the Spanish Government a grant of a tract of land embracing the premises in controversy. That he had such a grant, and a perfect title by virtue of it, must be taken, in the further consideration of the case, as established facts. (7 Cal. 527; *Dewey v. Gray*, 2 Id. 374; *Clary v. Hoagland*, 6 Id. 687; *Washington Bridge Co. v. Stewart*, 3 How. 424; *The Santa Maria*, 10 Wheat. 442; *Simple v. Anderson*, 4 Gilm. 546; *Meredith v. Naish*, 4 Stew. & Port. 59; *Stiver v. Stiver*, 3 Ohio, 19; *Spafford v. Bradley*, 20 Id. 79; *Hobson v. Doe*, 4 Black. 489; *Hossack's Executors v. Rodgers*, 25 Wend. 313.)

\*II. The claim of ownership of the original tract [460] of land possessed by Manuel Nieto, made by his children, and accompanied in 1832, the time of the death of the father of the plaintiffs, by an uninterrupted, notorious, and respected possession, according to metes and bounds, for a term of forty-eight years, is sufficient to maintain ejectment

for the whole tract of land, even though the claim of ownership may have been founded on a bare permission to graze cattle, or upon any other defective or even void instrument of writing.

There are many decisions illustrating this doctrine, but none so rich and copious as the case of *La Frombois v. Jackson*, 8 Cow. 590. Six members of the Court delivered opinions, elaborately discussing the doctrine now in question, and announcing a unanimous judgment of the Court.

*La Frombois* claimed against the lessee of *Smith et al.* a tract of land, and relied upon adverse possession under color of title. Upon the trial, the document under which he claimed title was produced, and it certainly was more defective than even the written permission to graze cattle mentioned in the special finding in this cause. "It is not necessary," said Chancellor Jones, "to constitute an adverse possession, that it should have commenced under an effectual deed. If the possessor claims under written evidence of title, and on producing that evidence it proves defective, the character of his possession as adverse is not affected by the defects of his title. If the entry is under color of title, the possession will be adverse, however groundless the supposed title may be." The whole case is referred to as, in every line, embracing principles directly analogous to the one under consideration, and as established beyond controversy that the possession of the children of Manuel Nieto, accompanied by a claim of title, even though that title be ever so defective, established an adverse possession to all the world, and in the year 1834 had ripened into so robust a right as to have enabled the parties then to have maintained ejectment against all the world, which right has never been lost by the appellants owing to infancy.

In Louisiana, in *Bernard v. Shaw et al.*, 9 Martin, 49, the Courts have gone further, deciding that claim of title [461] is sufficient \*to color the possession, even though it was based upon a deed absolutely void; and this decision establishes the identity of the doctrine of adverse possession in the civil and common law. And so in Maryland, *Gettling's Lessee v. Hall*, 1 Har. & John. 14-18.

The Court should have presumed a grant to Manuel Nieto or his children. The doctrine of presuming a grant does not

depend upon the Court being satisfied of the fact that such a grant was once made; on the contrary, the presumption is indulged in for the purpose of protecting an ancient possession, when the Court is even satisfied that no such grant was ever in fact made.

In the case of *Eldridge v. Knott*, Cowper, 215, Lord Mansfield said: "Lord Colke says somewhere that an Act of Parliament may be presumed; and of late it has been held that, even in the case of the Crown, which is not bound by the statutes, a grant may be presumed from great length of possession. It was so done in the case of the corporation of Hull and Horner; not that, in such cases, the Court really thinks such a grant has been made, because it is not probable a grant should have existed without its being on record, but they presume the fact for the purpose, and from a principle of quieting the possession."

But a much stronger case of presumption than is needed in the case at bar is presented by *Goodlittle v. Baldwin*, 11 East. 488. This was a case where it was shown affirmatively that the premises were taken possession of by encroachment upon the Crown lands, without any pretense of title; that, for a portion of the premises, the possession was taken about fifty-five years before the commencement of the suit, and for the balance about forty years previous to the same period. The original possessor died about nineteen years before the commencement of the suit; and two years after, or seventeen years before issuing the process, plaintiff was ousted, so that for a portion of the premises it was shown affirmatively that there was only a possession of twenty-three years; that this possession was by encroachment, or squatting, on the Crown lands; that there was no claim of grant or ownership; and that plaintiff had been out of possession seventeen years. Upon this state of facts, Graham, Baron, holding circuit at Gloucester in 1809, nonsuited the plaintiff. Afterwards, before the King's \*Bench, the plaintiff moved [462] for a new trial upon the above facts, which was granted by the Court, Lord Ellenborough, Chief Justice, holding that on the above state of facts there was no difficulty in presuming a grant, unless it could be shown that the Crown was forbidden by Act of Parliament from granting the premises

in dispute, and that it was the daily habit of the Courts to presume grants from the Crown upon an uninterrupted possession of twenty years.

Afterwards, upon the second trial, defendant having shown that Stat. 20 Car. 2 absolutely forbade the Crown from alienating these lands, the Court held that no grant could be presumed against the express provisions of the statute.

But in the present case there exists no such difficulty as in Goodlitt's case, because the Spanish Governors of the Province of California indubitably had the power to grant the lands of the King of Spain. It is expressly conferred on them by the twelfth section of the Ordinance of 1754, (see 2 White's Recop. 66,) and is expressly recognized and upheld by the Supreme Court in *United States v. Clarke*, 8 Pet. 452, in the most unqualified manner, in a case where the Sovereign himself was impeaching the validity of a grant made by his representative. The same doctrine is asserted in 6 Pet. 728, and 9 Id. 759.

It is contended, then, that the doctrine laid down by Lord Mansfield in *Cowper*, and Lord Ellenborough in *Goodlitt's* case, applies to the case at issue, notwithstanding that the special verdict shows that there was in fact no grant, and that hence the whole doctrine of presumption of grants is applicable to this case upon the other facts found.

The special verdict shows that Josefa Cota and her children resided on the land until 1843, when she sold to defendant, who then entered into possession.

Manuel Nieto entered into possession in 1784 or in 1790, and the plaintiffs, his grand-children, only lost their possession in the year 1843, and hence a possession of fifty-three years is shown. During this entire period the special verdict reveals successive, continuous, and notorious acts of possession and ownership. "After the death of Manuel [463] Nieto, in 1804, his children continued to \*occupy the tract of land above described, with boundaries above specified." "From 1796 to 1833 the said tract, with the said boundaries above specified, were known and respected by the neighbors."

Again: "Juan José Nieto, Manuel Nieto, Josefa Costa, and Catarina Ruis, in 1833, agreed verbally to make a partition of

the lands." What greater act of ownership could there be than this? And what more explicit recognition of the ownership than when the Government ratified and sanctioned the partition?

Again, the special verdict says: "The neighbors respected the tract of land with its boundaries." How respected? By submitting to the claim of ownership of the Nieto children, and permitting them to have the sole and exclusive use of this immense tract of land for the benefit of their immense herds of horses and cattle. It is contended, then, that these claims and acts of ownership are sufficient to have forced the Court to have presumed a grant of the premises to them, "for the purpose of quieting the possession."

Why should the neighbors respect the possession of the Nietos unless they were the owners? And why should the officers of the Spanish Crown tacitly acquiesce in this exclusive claim and possession unless there was a title?

6 Manning, Granger, and Scott (6 Eng. Com. Law Rep. 861.) This case contains an immense quantity of learning and facts. The point in issue was this: In 1564, Queen Elizabeth granted the Manor of Langdon to ancestors of plaintiffs, including the right of wrecks; but the grant was not in such terms as to include the *littus maris*, or the land between high and low water mark, and the *locus in quo* of the alleged trespass was on the *littus maris*. By the evidence upon which plaintiff rested his case, it appears that for at least forty years he had been in the habit of taking from between the high and low water mark sand, ore-weeds, and stones, and that no other person, except the plaintiff, or by his license, had done so. Also, that wrecks had been taken on two or three occasions by the plaintiff, on the *locus in quo*, and applied to his own use. Now here was a grant offered in evidence, and relied on, which excluded the idea of a grant of the *littus maris*.

Per Lord C. J. Tindal: "The grant of Elizabeth gives the \*right of wreck, which, according to Lord [464] Hale affords strong grounds for presuming that the soil between high and low water mark is intended to pass by it. And there was besides a considerable body of evidence of acts done by the plaintiff, and those under whom he

claimed, that raised a strong and almost irresistible presumption that they were the owners of the soil."

As in the case at bar, the facts negatived the existence of a grant for the *locus in quo*, yet from the acts of ownership for forty years the Court presumed everything that was necessary to sustain plaintiff's right of action.

One other case only will be quoted in final illustration of this principle, decided by the Supreme Court of the United States—*Mitchell et als. v. United States*, 9 Peters, 759. This was a claim for near three hundred leagues of land, which was sustained by the Court, thereby reversing the decision of the lower Court.

"Anything which would make the ancient appropriation good, (Cowp. 110,) if it could have had a lawful foundation, for whatever may commence by grant is good by prescription. (1 Roll. Ab. 512; 4 Mod. 55; 1 Saun. 345.) The length of time which brings a given case within the legal presumption of a grant, charter, or license, to validate a right long enjoyed, is not definite, depending upon its peculiar circumstances. In this case, we think it might be presumed in less time than when the party rested his claim on prescriptive possession alone. There is every evidence, short of the sign manual or order of the King, approving and confirming this grant; and if that were wanting to secure a right of property to land which has been held as these have been, the law would presume that it once existed, but was lost in lapse of time and change of Government, the more especially as by the laws of Spain the presumption for the period of ten years has the same effect as twenty years by the principles of the common law."

III. Whatever might be the truth concerning the original title of Manuel Nieto and his children, yet Josefa Cota, the mother of the plaintiffs, and their natural guardian, and the defendant, her grantee, are estopped from denying the original title of Manuel Nieto and his children to the lands in dispute.

Antonio Maria Nieto, son of Manuel Nieto, and [465] father of plaintiff, being in the peaceable possession of the premises in dispute, claiming to own them, intermarried, in the year 1815, with Josefa Cota, the mother



of plaintiffs, and grantor of defendant. Thence, necessarily, Josefa Cota, the wife, made entry in 1815 upon the lands in dispute in subordination to the title of Antonio Maria Nieto, her husband, and continued to reside upon said lands until 1834 under the same title, because it is not contended that she ever acquired any adverse right until 1834.

Luciano Grijalba, who presented the petition to Governor Figueroa upon which the alleged title issued, represents that he acts for Juan José Nieto, who is the head of the Nieto family. Now, Josefa Cota and her grantee, the defendant, claim under the title which Figueroa issued in pursuance of the request of Grijalba; hence they recognize his authority and agency, and are bound by his declarations made within the sphere of his agency. Now, every line of his petition asserts the title of Manuel Nieto and his children; are not Josefa Cota and her grantee bound by his representations? Again: the primary decree of Governor Figueroa of twenty-seventh July, 1833, expressly declares, not only the title of Manuel Nieto and the long and ancient possession of himself and family of the lands described in the map, but declares that he himself had actually seen the title papers issued to Manuel Nieto by Governor Fages; and the alleged grant under which Josefa Cota and her grantee, the defendant, claim title, specifically refers to the primary decree, and recites that the consideration of the instrument itself is the fact that she, Josefa Cota, "had shown that she is entitled to the estate of the deceased Manuel Nieto;" that she had "had the ancient and peaceable possession of the described premises." Now, then, is not Josefa Cota, and consequently her grantee, estopped, by the recitals upon her title itself, from denying the original title of Manuel Nieto? It is confidently claimed that she is estopped, and that her grantee, the defendant, claiming under the same title papers, is also estopped. (4 Comyn's Dig. verbo Estoppel, 195.) An estoppel is where a man is concluded by his own act, or acceptance, to say the truth. (Co. L. 352 a.) And it may be by matter of record, of writing, or *in partis*. By matter of record—as if the King by his letters patent grants lands to B, \*claim- [466] ing nothing in the freehold, B cannot say afterwards against the King that he was enfeoffed by A. "So a man

may be estopped by acceptance of rent, so by entry, or livery," etc. (Co. L. 352 a.) Then Josefa Cota would be estopped by recitals in grant, because she made entry and claim under it. So, if defendant has entered into possession under the plaintiff, he shall not be permitted while he is in possession to controvert the plaintiff's title. (1 Nott & McCord, 373 n; *Teller et al v. Burtes et al.*, 9 Johns. 179, 180; 10 Id. 178-435; *Hill v. Streeter*, 5 Cow. 530; Adams on Eject. 47, note 1.)

In New York, in *Phelan and Wife v. Kelley*, 25 Wend. 389, this very case is decided. It would be difficult to find a case more analogous. The law in that case, as existing in England and the United States, was clearly laid down by Chief Justice Nelson. It was there held that where the father held a bare possessory right to land, and upon his death his family succeeded to his possession, two of the sons could not acquire an adverse title to that of the father, and that the sister was entitled to recover on the possession of the father, though her brothers had acquired and assigned to defendant the true and valid title. In that case the estoppel worked upon the brothers; in this case it is invoked against the mother, the guardian of the infant plaintiffs, whose special duty it was to protect their rights.

Josefa Cota came into possession in 1815, under the title of Antonio Maria Nieto, her husband, who was in possession, claiming as owner. How, then, can she be permitted to assert an adverse title, or her grantee? The English cases cited in Wendell fully sustain this doctrine (29 English Com. L. 16; 30 Id. 67) and apply it to the grantee.

Upon the death of the father of plaintiffs, in 1832, their mother, Josefa Cota, became *de facto* and *de jure* their guardian. At that time it is not pretended that she had any title; but she was in possession under the claim of title inherited by her children, and though living upon the premises in dispute since the year 1815, she never pretended to have acquired any right to the lands previous to 1834, and whatever rights

she may have acquired adverse to plaintiffs were acquired in 1834, at a time when they were infants, \*when she was their natural guardian, and when she was in possession under their claim of title, and in no other way whatever.

IV. The documents issued in 1834 by Governor Figueroa, and called grants, and relied on by defendant in his answer as such, are not in fact grants, nor were they intended to be such, but were asked and given simply for the purpose of serving as a solemn and official recognition on the part of the Mexican authorities of the ancient title and possession of Manuel Nieto, held under the Crown of Spain, and at the time of recognition descended to and vested in his lawful heirs.

In April, 1822, the Province of California first recognized the successful revolution which established the independence of the Mexican Republic. This revolution found the children of Manuel Nieto, including Antonio Maria Nieto, the father of plaintiffs, in the peaceable and notorious possession of the entire Nieto tract of land, and making a claim of ownership thereto. The desire to obtain a solemn recognition of the ancient title of their father from the new and revolutionary Government naturally influenced the children of Manuel Nieto, at the head of whom stood the eldest son Juan José Nieto, as appears by the petition of Grijalba. This desire was reasonable. The tract of land occupied by them was immense, and was daily becoming more valuable beneath the influence of the increasing population of California. The evidence and the documents in partition reveal the anxiety of the Nieto family to obtain a recognition of the original title. They constantly made the claim of ownership, while they never petitioned to have the land granted to them. The petition of Luciano Grijalba to Governor Figueroa expresses two objects: the one, the recognition of the title of Manuel Nieto, rendered necessary by the loss of the original papers; and the other, the sanction of the Government of the partition, and the issuing of separate documents to the heirs, respectively, of the separate parcels; and the attention of the Court is particularly called to the fact that this petition asks to have the title of "Santa Gertrudis" issued to Josefa Cota and her children.

In pursuance of the petition of Grijalba, Governor Figueroa determined to recognize the ancient title of Manuel Nieto, and \*hence executed his primary decree of [468] twenty-seventh July, 1833. It is respectfully sub-

mitted that this decree does not purport to grant, but simply recognizes a preëxistent grant to Manuel Nieto; that it uses no word of concession or grant, but only "declares" them to be owners. The words "declare to be owners," instead of "grant," were used, *ex industria*, because the title having already vested in Manuel Nieto the Mexican Government held nothing in the lands to "grant." How could Governor Figueroa have undertaken to grant that which he declares was already granted by Governor Fages to Manuel Nieto? It is evident that Figueroa was simply complying with the desire of the Nieto family, and recognizing the original title, and sanctioning the partition of the entire tract into four parcels, representing the one-fourth interest of each of the children of old Manuel Nieto.

The recitals in the document given to Juan José Nieto and in the one given to Josefa Cota are precisely alike. In both it is stated that the parties had proved their right to the estate of Manuel Nieto, deceased. What right could Josefa Cota have proven to the estate of Manuel Nieto? None whatever. She was a stranger to his blood, and only represented the right of her children. In neither of the documents is the word "grant" used, but simply the party is "declared to be owner." No new title is conferred or granted, but by virtue of one already existing they are "declared to be owners," and there is a specific reference to the decree of twenty-seventh July, 1833. That these documents were not intended to operate as grants may be gathered from another circumstance, viz.: the omission to insert the usual condition of subjection to the approval of the Territorial Deputation.

Here the counsel will refer to two depositions taken on the trial below. This reference is not made for the purpose of eliciting any facts concerning the case, but proposes simply to aid the Court to decide upon the meaning of the written documents submitted for its interpretation. The depositions are one of C. E. Carr, Clerk of the United States District Court for the Southern District, and the other is Captain H. W. Halleck.

It will be seen from a perusal of these depositions, given by two gentlemen whose position gives them the best [469] opportunities of testi-\*fying intelligently, that in

Mexican grants the word "*conceder*, to grant," was a technical word; and that the word "*declarar*, to declare," has probably never been used but in the single case of the Nieto grants; and that grants, as an ordinary rule, always contained the condition of subjection to the approval of the Assembly.

It is an historical fact that Governor Figueroa was an able and educated man, and certainly the most learned of the Mexican Governors; how pregnant with meaning, then, is this variation from the usual form?

As the result of this examination, it is submitted that the document relied on in defendant's answer, and referred to in the special verdict, is not a grant to Josefa Cota, but is simply a solemn recognition of the ancient Nieto title, and delivered to her as the representative of the plaintiffs, and that so far from being a grant to her the said document recognizes and establishes beyond question their title.

It will be vain for the defendant to endeavor to escape from the notice of these facts; the very documents he relies on. the only right he claims, bear proof upon their face of notice. But even this is not necessary. He certainly cannot stand in a better position than his grantor. The case in 25 Wendell. and in 2 and 3 Adolphus & Ellis, 19 and 20 Eng. C. L. R., establish the principle that he is bound in the same manner as his grantor. Nor can it be urged that the plaintiffs have been guilty of laches, as will appear by the following key of their ages, as set out in special finding. Until March, 1850, the Mexican laws concerning minority were in force, and majority was only attained at the age of twenty-five years, and no limitations less than ten years could affect a right to real estate. Petra, the eldest, was of age in 1841, so that in 1850 nine years had only elapsed, and then the new law of limitations extended her right five years from 1850. This action was instituted about January, 1853. Concepcion was of age in 1844, Diego in the year 1848, José Antonio in the year 1850, Maria Dolores in the year 1851, and José Jesus in the year 1852.

*James A. McDougall & Solomon A. Sharp*, for Defendants and Appellants.

[470] \*I. The plaintiffs insist that their possession for forty-eight years, although their entry was under a permission to graze cattle, raises a presumption of title in them.

There are several sufficient answers to this. They all rest, however, upon this simple rule, that there cannot be a presumption inconsistent with and repugnant to an ascertained and acknowledged fact. The testimony proves, and the Court finds, that Manuel Nieto entered under a written permission ("not a grant of title") to graze cattle. That after his death his children continued to occupy "under the same permission given to their father," until the grant by Figueroa. We might insist upon the rule, "*nullum tempus occurrit regi*," and show that it obtained as well in Spain as in England; but we rely upon the much more simple test—the fact which repels the presumption and furnishes the true premises for a conclusion under all systems.

In considering this point, we assume that the Government of Mexico granted to Josefa Cota, in 1833; and the question presented is, can the Nietos, by virtue of the presumptions growing out of their possession, prescribe against the Mexican Government? The following rules are quoted from the authorities cited: "Instruments which do not purport to convey title, as leases, contracts, etc., cannot be the foundation of an adverse possession." (Adams' Eject. 574.) "There is another objection against setting up any adverse possession under the contract, such possession must not only be hostile in its inception, but must continue so for twenty years." (*Jackson v. Camp*, 1 Cowen, 610.) "But as the ancestor is proven to have gained the possession not by disseizin but by contract with the owner of the claim, through which the defendant now asserts his right, it is plain that so long as the possession was held, under that contract, it cannot have been adverse to the defendant's title." (*Higginbotham v. Fishback*, 1 A. K. Marsh, 506.) "Reynolds has, by his admissions, recognized Low as his landlord; he cannot therefore be admitted to dispute his title." (*Jackson v. Reynolds*, 1 Caines, 444; see cases cited and collected in note, Adams on Eject. 40, 41.)

The rule of the Spanish law is not substantially different

in this particular. Ordinary prescription, as defined by Spanish law, is \*the acquisition of the ownership [471] of a thing by having the possession of it during the whole of the time required by law. Its requisites are four: 1st, just title; 2d, good faith; 3d, continued possession; 4th, the time fixed by law. (Manuel del Abogado Americano, Lib. 2, Tit. 2; Part 3, Tit. 29, Lib. 9; Alvarez, Lib. 2, Tit. 6; Sala Mexicana, 2, pp. 73-75; Febrero Mexicano, 1, pp. 348, 349; Gomez y Montalban, Tom 1, Cap. 5. sec. 4; Escribano Derecho Espanol, Lib. 2, Tit. 2.) "Title is the cause proper to transfer ownership, as donation, purchase, etc." (Manuel del Ab. Am. Lib. 2, Tit. 2; Alvarez, Lib. 2, Tit. 6.) "By just title, which is also called colorable title, we understand anything which if it issue from the lord of the thing, may transfer the dominion; that is to say, sale, exchange, donation, institution of heir, and others, are just; but deposit, lease, loan, are unjust, because, although they issue from the true lord, the latter did not by them propose to transfer the dominion." (Sala Mexicana, 2, p. 76; see also *Frique v. Hopkins*, 4 Martin, N. S. 224; *Paschal v. Perez*, 7 Texas, 370; *Dufour v. Camfranc*, 11 Martin, 715; *Bowen et al. v. Powers*, 3 Martin, N. S. 462.)

It will be clearly seen that in all cases where possession is permitted to establish a prescriptive title, the possession, both in its inception and during its continuance, must have been adverse; and that when a party or his ancestor entered as tenant, no period of time, however long, will prevent his being estopped from denying the estate of his landlord, whensoever it is asserted.

II. The position requiring most consideration in this discussion is the one holding Josefa Cota estopped from denying the estate in Manuel Nieto, by reason of the recitals in Grijalba's petition, and the recitals in the decrees and grant to her; and this for the reason that this position is taken in the opinion in this case on the former hearing. (7 Cal. 533.) It was suggested by the counsel for respondents at bar, that this opinion constitutes a part of the law of this case, and that therefore the question is not open to review. There is no doubt but that the judgment of this Court, however erroneous, becomes part of the law of the case; so

this Court has said, and it has said nothing further. In this case there was a simple judgment of reversal. There [472] was a full trial *de novo*, \*and while the opinion of this Court amounted to instruction to the Court below, it amounted to nothing more. All judgments become final after the term has expired. The judgment is what the Court declares as to the rights of the parties, not the reasons for the declaration. There is nothing in the judgment to deprive this Court of full power over this case, and it is the assertion of a strange doctrine that the Court cannot now administer the law of this case by reason of the expression of a former erroneous opinion. In *Stearns v. Aguirre*, 7 Cal. 448, upon a similar question made, the Court says: "At common law, the Appellate Court either affirms or reverses the judgment upon the record before it. The opinion which is rendered is advisory to the inferior Court, and after the reversal of an erroneous judgment, the parties in the Court below have the same rights that they originally had." It may be proper to mention here, that on the former hearing this question was not fully argued before the Court, at least on the part of the appellant, on account of the brief time afforded counsel for preparation, and for the reason that the facts, history, and law governing the question, were found mostly written in a foreign language.

In entering upon the subject, it is worthy of remark, that neither the sufficiency of the grant by Figueroa to Josefa Cota, nor the regularity or sufficiency of the grant by Josefa Cota to Carpenter, was ever questioned until the institution of this suit. The grant was made by one Mexican Governor (Figueroa.) The sale was authorized by another (Micheltorena.) The latter was known as a man of learning and ability. The business was transacted before the highest judicial officer of the district; it was acquiesced in by the numerous family of the Nietos; no suspicion of unlawfulness, of technical or actual fraud, arose. Estoppels grow out of technical or actual fraud. The Nietos never dreamed that they had been defrauded until it was discovered after the introduction of our government, people, language, laws, and lawyers. It would seem to be a fair presumption that the history of the Santa Gertrudis Rancho, the conditions, rela-



tions, and rights of parties claimants; the relation of the Government to and its power over the property; the signification, force, and effect of grant and contract terms; and \*the law of the land as applied to all these con- [473] siderations, would be as well understood, and as truly recognized, by the officers and people whose business it was to understand the history, language, and laws of the country, and the condition and history of this particular property, as by the representatives of the respondents in this case, who have undertaken to pronounce upon them. That the facts and the law of this case were properly understood, we will now undertake to affirmatively maintain.

The doctrine of estoppel, as known to the common law, was of feudal origin, (1 Greenleaf, 25,) and unknown to the civil or Spanish law, and the whole doctrine of technical estoppels has been fiercely assailed by the continental jurists, as one of the great defects of our system. The only rule of the civil law analogous is, that a party shall not take advantage of his own fraud, which corresponds with our law of equitable estoppels, but they have no rule estopping a party from proving the truth, as against his own admissions, either by deed or parol. We have no objections, however, to accept the respondents' own field of controversy, and test this question by the settled rule of the common law.

In 1 Green. Ev., sec. 22, it is said: "The doctrine of estoppel has been guarded with great strictness, not because the party enforcing necessarily wishes to exclude the truth; for it is rather to be supposed that that is true which the opposing party has already solemnly recited, but because the estoppel may exclude the truth. Hence, estoppel must be certain to every intent, for no one shall be denied setting up the truth, unless it is in plain and clear contradiction to his former allegations and acts." In *Sampson v. Cooke*, 5 Barn. & Ald. 611, Holroyd, J. says: "Estoppels are odious in law, and, being so, they ought not to be allowed, unless they are very plainly and clearly made out." In *Hales v. Risley*, Pollexfen, 396, it is said, "Estoppels are odious in law, because they hinder truth. Next, estoppels must be certain and positive, and not by argument or inference." (Coke Ins. 352 b.) "A man shall not be estopped when the truth appears

by the same record." (Co. L. 352, b.) "A man shall not be estopped to aver a thing consistent with the record."

(Comyn Dig. tit. Estop. E. 3.) "An estoppel against [474] an estoppel sets the matter at large." \*(Id. Estop.

E. 9.) "A deed poll does not estop a lessee, grantee, etc., for it is the deed of the lessor, grantor, etc., only." (Co. L. 363, b.) "A party is not concluded by acceptance or the like." (Id. 352, b.) "Estoppels must be reciprocal, and bind both parties." (Comyn Estop. B.) In *Heane v. Rodgers*, 9 Barn. & Cres. 586, Bayley, J. says: "We think that he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such a case the party is estopped from disputing their truth with respect to that person (and those claiming under him) and to that transaction, but as to third persons, he is not bound. It is a well established rule of law that estoppels bind parties and privies not strangers." In *Newton & Watkins v. Liddiard*, 64 Eng. Com. L. 925, the same rule as to the necessity of the admission changing the condition of the party is laid down; as also in *Howard v. Hudson*, 75 Eng. C. L. 11. The case of *Stronghill v. Buck*, 68, Eng. C. L. 781, contains, perhaps, the most clear exposition of the rule as to who are bound by recitals or covenants in the deed, and who are estopped by them. In that case it was recited in a deed that certain moneys had been advanced: *Held*, that the recital was to be taken as the language of the defendant only, and did not estop the plaintiff from saying that it was not advanced. "Where a recital is intended to be an agreement of both parties to admit a fact, it estops both parties, but it is a question of construction whether it is so intended."

Adopting the view of the facts of this case, taken by plaintiffs, and testing their position by any one of the foregoing rules, and it will be found that each separate test proves their position false.

Previous to the conveyance to Carpenter, Josefa Cota had made no false allegation; she had made no allegation whatsoever, either by way of petition, recital, argument, or covenant. She had said nothing to Governor Figueroa; she

certainly had neither said nor represented anything to these plaintiffs. Grijalba was avowedly only the attorney in fact of Juan José Nieto. Estoppels must be mutual. By what terms, to what extent, in what respects, are the present plaintiffs estopped or bound? The conduct or statements \*of defendants' grantor must have operated [475] upon the condition of plaintiffs. How have they changed their condition? By what fraud in fact or in law have they suffered? The grant is but a deed poll, in which the grantee says nothing, and therefore has agreed to nothing. There is nothing in it "intended as an agreement to both parties to admit a fact." The "acceptance" by Josefa Cota cannot work an estoppel. If the recital that the Governor had seen the concession would estop the Government, then, in the same instrument, the Government assumes the power, and undertakes to grant, so that while the Government in one sentence admits the title outstanding, in the other it claims the title in itself. If the first term would operate an estoppel, so would the second, and an estoppel against an estoppel leaves the question free.

Admitting plaintiffs' view of the facts, the conclusion is, that there is nothing in the recitals in the decrees and grant by Figueroa which operates a technical estoppel, or estoppel by deed, as against Josefa Cota, or those claiming under her.

The defendant now insists that there is nothing in the decrees or grant of Figueroa, inconsistent with the assumption and proper exercise of the power to grant the entire estate to Josefa Cota. That there is nothing recited inconsistent with the fact found by the Court below, that the Nietos held under a permit in writing, to graze cattle, without other claim of right. And we insist, if the recitals can be understood consistent with the ascertained fact, they must be so construed.

It will be observed that in the translation of the decree of twenty-seventh July, 1833, adopted by the Court in its former opinion, the term "concession" is rendered "grant." Upon an examination of the copies of the originals in the record, it will be seen that the character of the concession which Figueroa had seen, is nowhere defined. The written license issued to Manuel Nieto, was as strictly and technically a con-

cession, as would have been an absolute grant. Such a concession, with an ancient, peaceable, and undisturbed possession, in connection with the colonization policy and laws of the Republic of Mexico, might have been good reason why the family should be invested with the estate, but would not qualify the power or limit the discretion of the Government. Josefa Cota was then in fact possessed.

[476] There was no reason why the Government might not make her the grantee, and many reasons might have been urged in favor of such action. It certainly met the views of the family of the Nietos.

It is certainly true that Figueroa did not mean to be understood that he had seen an absolute grant to Manuel Nieto, for the following reasons:

1. There was a concession which he might have seen.
2. There never was an absolute concession.

3. Don Pedro Fages, in 1784 or 1790, had no power to make a grant. This power did not exist in any of the Governors previous to the Revolution, but belonged to the Junta de Hacienda, and was administered by the Royal Intendant. This was matter of notorious history, and it is to be presumed that Figueroa was not ignorant of the fact. (See *Paschal v. Perez*, 7 Texas, 368-371; Opinions of the Minister Galindo Navarro, dated twenty-seventh October, 1785; Surveyor-General's Office, State Papers, vol. 1; Missions and Colonization, 808; Instructions of Lopola, Intendant of Chihuahua, to Don Pedro Fages, inclosing the same opinion, and instructing accordingly, dated twenty-first June, 1786, in same volume, Surveyor-General's Office; Acts and Regulations for the government of the Province of California, approved by Royal order of twenty-fourth October, 1781, to be found in the official report by Halleck; California Message and Correspondence, 1850, Cong. Doc. 134; Instructions of Pedro de Neva, Intendant of Chihuahua, to Romero, Governor of California, March 22d, 1791, to be found in same volume. 139.)

4. It is a fair presumption that the Governor understood the laws he was administering, and the subject matter over which he exercised jurisdiction. It is a very violent presumption that he should grant to Josefa Cota certain lands,

and declare to her the ownership, when the right was in others, and he, as Governor, had no dominion over the subject. It is a fairer presumption that he knew and meant to recite the consistent truth.

5. The interpretation of the grant to Cota by all, including the Nieto family, as well as the local officers and governors, and their perfect acquiescence in her right, shows that there was no pre-tense of right, only a [477] claim of favor, antecedent to the grant in 1833.

This interpretation of the grant by Figueroa is ably maintained in the opinion of the Board of Land Commissioners, before whom both plaintiffs and defendant presented their several claims. It was the peculiar business of that Board to master questions like this, involving the history, laws, and language of the country, and therefore their opinion in this case should have the weight of high authority.

III. Upon the trial and former hearing in this Court, much stress was laid upon the distinction between the words *conceder*, as a technical term of grant, and *declarar*, as one used only in this case, and used as a term of confirmation.

Upon examining, critically, into the meaning and use of those words, it will be found that both counsel and the Court have been led into error on the subject, and that *declarar*, *conferir*, and *conceder*, are used indiscriminately as terms of grant, while *revalidar* is the technical term of confirmation, or rather of reinvestiture, with the muniments of title—for, strictly speaking, if it is admitted that the title wanted confirmation, the fee must then have been in the Government, and the Government could have invested any third person with it at pleasure.

(Diccionario de Sinonimos, par Don Pedro Martin, vol. 2, p. 112.) This authority says that the most general use of the words *declarar* and *declaracion*, is, judicially, as *tomar declaracion auto declarativo*. That according to the derivation of the word, it indicates a clear demonstration, an important action, a will resolved and firm. Its most general use is in matters important and necessary for all to know; as, for instance, laws, ordinances, and decrees and regulations; and for this reason, the Government uses it in its publications, proclamations, edicts, etc. In the official report of Wm.

Carey Jones to the Secretary of the Interior is given the ordinary form of grants made by Gov. Figueroa, from which we extract as follows:

"In virtue of the powers conferred upon me, in the name of the Mexican Nation, by decree of this date, I have determined to grant (*conceder*) to the said Estudillo the tract of Temecala aforesaid, declaring it by these presents to be his property."

[478] \*It will be perceived that the last term is the operative one in the instrument. We give the following further examples, to be found in the office of the Surveyor-General:

"Using the faculties on me conferred, in the name of the Mexican Nation, (*Lo Declaro a las Señores Palomares y Vexar dueños en propiedad del paraje mencionada,*) I declare the citizens Palomares and Vexar owners in property of the aforementioned place." \* \* \* \* \* JUAN B. ALVARADO."

"In conformity with law in relation to the land solicited (*Lo Declaro á José de la Lus Sirner dueño en propiedad por las presentas letras.*) JUAN B. ALVARADO."

*Libro de Razon*, Surveyor-General's office, No. 67, grant by Figueroa.

"*Por Cuanto Maria del Carmen Rodriguez y Hermanos, Mejicanos por nacimiento, ha pretendido, por su beneficio personal la propiedad del terreno conocido por el nombre de Conejo, usando las facultadas que me son conferidas en decreto de esta dia, y á nombre de la Nacion Mexicano, hevenido en declarar la propiedad.*"

Same volume, No. 89: "*En nombre de la Nacion Mexicano se declara dueño absoluto del terreno mencionada.*" Grant by José Castro. The same volume, No. 46, grant by Figueroa; No. 100, grant by Outierres, and No. 101, grant by Gutierrez, the same language is used. In case No. 93, in the same volume, Governor Figueroa revalidates a grant to Vallejo, using these terms: "*En revalidacion de una concesion hecho por Don Hablo Becinte de Sola, 23 de Febrero, de 1823.*"

Of the twenty original grants made by Governor Castro, and to be found in the *Libro de Razon*, nine have the words: "*He venido en conferir;*" seven have the words, "*He venido*

*en declarar*," and only four have the words, "*He venido en conceder*." Governor Alvarado used the words *conceder*, *declarar*, *conferir*, but *declarar* most frequently.

The conclusion from the signification and use of this word must be, that so far from its qualifying the grant to Josefa Cota, it exhibits the exercise of the highest and most complete power of the \*Government in investing her [479] with the estate, and that thereby the estate was not merely conceded, but was also adjudged to her.

The decrees and grant of Figueroa, in all respects in which they are peculiar, are to be understood thus: A claim is presented by the persons in possession of certain premises, addressed to the equitable consideration of the Government. In the exercise of the full power of the Government, and having jurisdiction and dominion over the subject matter, for sufficient cause shown, the Governor grants the application, and not only concedes, but adjudges to the respective parties named in the grant, the premises in question.

Had the Governor this power? It is found that the title remained in the Government, and if so, he certainly had the power, and it seems to us that, if it is conceded that he had the power, and if it is the fact that he exercised it, by making a grant to Josefa Cota, no technical speculations can be given force sufficient to defeat her right.

IV. Assuming that the possession of Josefa Cota was for and on account of the heirs of Manuel Nieto or the children of Antonio Maria Nieto, the order of Governor Micheltorena was sufficient to justify the sale to the defendant.

In the former opinion (7 Cal. 534) this Court says: "This view of the legal effect of the grant by Figueroa to Josefa Cota would be conclusive upon the rights of the parties, were it not for a fact in the record upon which there appears to be no finding of the Court, and which seems not to have entered into consideration in the decision of the case below: that is, that the sale to Carpenter, the grantor of the defendant, was made in pursuance of a decree of the Court of First Instance of Los Angeles, and that the Judge of said Court made said order of sale in conformity with the direction in writing of Micheltorena, at that time Governor of California, vested with plenary powers. It is in evidence that these were based upon

the representations of Josefa Cota, the natural guardian of the infant heirs, and that the land was sold and the proceeds applied to their maintenance and support. Now, whether the Court of First Instance had the inherent power to order a sale in such cases or not, is a matter of little consequence, inasmuch as the proceeding was authorized by the [480] Governor, who \*was invested with all power, and whose acts the law presumes to have been done correctly. On this point we are satisfied that the plaintiffs are not entitled to recover."

Adopting the opinion of this Court as to the power of Governor Micheltorena, and also as to the effect of the testimony adduced, it would seem unnecessary to do more than suggest that we are now relying upon this defense, as well as upon the others suggested.

The Court below seems to have taken the position that a judicial act was required on the part of the Judge of the First Instance, by regular proceeding before him, to which the children should by some form of proceeding have been made regular parties, and that without such judicial act on his part, the conveyance to Carpenter would only operate to invest him with the estate of Josefa Cota.

This position is in direct opposition to the opinion of this Court, that the Governor possessed the power himself to authorize the sale—that is, to invest Josefa Cota with the power to sell. The term "authorization," as ordinarily used, is the mere celebration of the act by the Notary, and this was all that under the directions of the Governor, the Judge had to do; the Governor had invested her with power to sell.

As for the heirs not being notified, it is to be remembered that Josefa Cota was their natural guardian, and could herself apply in their behalf. Besides this, Micheltorena had jurisdiction over the subject matter, and over all the persons, and it is to be presumed that he exercised this jurisdiction regularly. The subject matter was the Rancho Santa Gertrudis. Josefa Cota asks permission to sell and convey it, on account of her numerous family, their poverty and their necessities, and because, without such permission, it will be lost to her and them. All this the Governor had the right to consider,



did consider, and for these reasons did empower her to sell and convey the Rancho Santa Gertrudis.

This is the particular thing she was authorized to do. This she undertook to do, and did sell, and did convey; and under that conveyance we hold. It would seem that the only question which could arise here would be one of power in the Governor, and as this Court has affirmed the power, and as it has not been questioned in argument, and as we believe it to be beyond dispute, we \*will simply refer to [481] the instructions to Micheltorena of the eleventh February, 1842, to be found among the archives, in which it is said, "He (the President) has been pleased to grant to your Excellency, over and above the attributions assigned to you by the existing laws and regulations as Governor, Commandant-General, and Inspector, all the power which the Supreme Government can confer on you."

*Brent, Saunders, and Heydenfeldt*, for Plaintiffs and Respondents, in reply.

I. It is contended that no estoppel can operate, because Governor Fages had no power to grant to old Nieto, and that there can be no estoppel against the law.

Governor Fages had the power. The only title the Peraltas had for a tract of land known to contain near six leagues was a grant of Governor Sola, dated eighteenth of August, 1822. The counsel for the United States made the point that Governor Sola had no authority to make the grant; and among other things relied on was the letter of the Commandant-General of the Internal Provinces, of 1786, now produced here by appellant. It was not claimed that Governor Sola had other power than the Spanish Governors possessed. The Supreme Court held the title valid, and remarked as follows: "It is sufficient for the case that the archives of the Mexican Government show that such power has been exercised by the Governors under Spain, and continued to be so exercised under Mexico, and that such grants made by the Spanish officers have been confirmed and held valid by the Mexican authorities." (*United States v. Peralta et al.*, 19 How. 347-8.)

But even if Governor Fages had not the power to make a perfect title, he could grant an inchoate title, and this could

be confirmed by Governor Figueroa. We now hold our title from his action, and the solution of this question is to be found rather in the power of Figueroa than in its absence in Fages.

The case in 7 Texas has no relevancy. There, the action at law was on a title issued by the Governor, which upon its face recited that a confirmation should be sought from the Intendant at San Luis Potosi, whose powers were based upon a royal ordinance of 1805. But this is a totally different case.

[482] \*Governor Figueroa had the absolute power of disposing of the public domain, and his recital estopped the Government. The appellant contends that estoppels must be mutual, and that here the heirs are not bound. But the estoppel is mutual upon the subject matter. Upon the heirs taking and accepting this estate, then they are equally estopped with the Mexican Government to deny their own title, and their mode of acquiring it.

This estoppel operates on the Mexican Government, and hence equally binds all who claim under that Government: and Josefa Cota and Carpenter so claim, and therefore they are alike estopped.

Suppose the fee of the land was in the Government of Mexico, Governor Figueroa could dispose of it as he thought proper, and he has vested it, by his acknowledgments and confirmation, in respondents.

II. It is contended that, admitting that in 1843 the possession of Josefa Cota was for and on account of the heirs of Manuel Nieto, or the children of Antonio Maria Nieto, the order of Governor Micheltorena was sufficient to support the deed to the defendant. The Judge of First Instance, *virtute officii*, was a Notary Public, but the offices were as distinct as if belonging to different persons. The deed was authorized by the Notary alone. It recites that the parties appeared "before the officer, and before my witnesses of assistance, with whom I acted as a Notary Public, there being no Notary Public."

It cannot be contended that the officer acted judicially, when the special finding, the deed, and the deposition of the officer, declare that he only acted notarially.

The Court is warned from attaching any force to the words "authorized the sale," beyond the meaning that "the deed was acknowledged by the Notary," because the Spanish use the word "*autorisar*" (to authorize) as applicable to the execution of an instrument in the presence of the Notary, and its authentication by his signature, precisely as the French express the same idea by the equivalent word "*autoriser*;" but this has reference only to the notarial act. and not to any judicial function.

When Carpenter and Josefa Cota appeared before the Notary to execute the deed, they exhibited the Figueroa document as \*Josefa Cota's title. The first con- [483] dition of that grant forbade the alienation of the lands claimed to have been granted. The Notary suggested this as a difficulty to the execution of the deed; and both he and Josefa Cota applied to Governor Micheltorena to know if the first condition was an obstacle to the sale. Micheltorena instructed the Notary that the condition against alienation was invalid, and that in the sale in question, and in other sales of grants containing like conditions, he should disregard it.

There was no question made of the right and title of the plaintiffs in these proceedings. There is nothing to show that Governor Micheltorena ever saw the grant, and he only gave his direction that a condition forbidding alienation was to be disregarded in this and other cases. He must have supposed that the lands belonged to Josefa Cota, and there is nothing in the evidence or finding to show that, for a moment, he supposed he was passing upon the rights of the plaintiffs.

If it were necessary, it might be clearly shown that Micheltorena had no power to interfere with judicial proceedings, and act as a Probate Judge; but the special finding shows that he did not so undertake to act. The extent and limitations of his power are as susceptible of demonstration as any other well authenticated fact.

FIELD, C. J. delivered the opinion of the Court—COPE, J. concurring.

This case was before the Court at the April Term of 1857,

and the facts upon which the decision then rendered was based are given either in the statement of the Reporter or the opinion of the Chief Justice, found in 7 Cal. 527. Some other material facts are disclosed by the record, to which no reference is made, either by counsel in their briefs, or by the Chief Justice in his opinion. The translation, too, of the documents set forth in the report is inaccurate in several particulars; and the misstatements arising from this circumstance, it is evident, had no slight effect in producing the decision. The judgment of the lower Court was for the defendant; this Court reversed the judgment, and remanded the case for a new trial. On the retrial judgment passed for the plaintiff;

[484] and the case, on appeal of the defendant, was again before the Court \*at the July Term of 1858. By the decision then rendered the judgment of the Court below was reversed, and that Court directed to enter judgment for the defendant. A rehearing having been afterwards granted, the case was reargued at the October Term, 1859, when the previous decision on the second appeal was affirmed. No opinion was given on that affirmance, but we stated at the time that so soon as the pressure of other business would permit we should prepare and file one in the case. We propose now to state the grounds upon which we rested our decision.

The action is ejectment for the possession of a tract of land known by the name of "Santa Gertrudis," situated in the county of Los Angeles. By stipulation of the parties the records on the two appeals are considered and referred to as constituting only one record, and as filed on the present appeal. All the facts disclosed by the two records are therefore before us, and we are not restricted to those specially found by the Court. A motion for a new trial having been made, we are at liberty to look into the evidence to see whether the findings cover all the material matters presented for consideration. (*Riley v. Heisch*, 18 Cal. 201.)

The material facts of the case are as follows: In 1784 Manuel Nieto obtained from Pedro Fages, the Military Governor or Commandante of California under the Crown of Spain, a written permission to graze cattle on a tract of land, now embraced within the county of Los Angeles, bounded on

the south by the ocean, on the east by the river Santa Anna, on the north by the old road leading from San Diego to Monterey, and on the west by the river San Gabriel, containing thirty-three leagues. Under this permission Manuel Nieto entered upon the tract with his cattle and other property, and laborers, constructed a house and corral thereon, and continued in the occupation of the premises until his death in 1804. His four children, José Antonio, Juan José, Manuela, and Antonio Maria, continued in the occupation, after his death, under the same permission. But while thus in occupation the children claimed to be the owners of the premises.

In 1815 Antonio Maria married Josefa Cota, and the plaintiffs, with the exception of Dryden, are the children of this marriage.

In 1832 José Antonio and Antonio Maria died, the first leaving Catarina Ruis, and the second Josefa Cota widows.

\*In 1833 the two sons living, and the widows, [485] agreed verbally to a partition of the premises, and to apply to the Governor for grants to them, respectively, corresponding with the divisions made. The premises were accordingly divided between them.

Afterwards, on the twenty-sixth of July of the same year, Luciano Grijalba, as attorney for Juan José Nieto, presented a petition to the Governor, asking that separate titles be given to each of the parties for the portions received by them, respectively, in the partition made—"the place called Santa Gertrudis to Josefa Cota and her children, as widow of Antonio Maria, deceased"—representing that in the year 1784 Governor Fages had granted the premises to Manuel Nieto, their ancestor, and given him the possession thereof, and that his heirs had continued in the possession after his death, but that the title papers had been misplaced.

On the following day—July 27th, 1833—the Governor made a decree declaring the parties for whose benefit the petition was presented owners of the premises in fee, and designating the portion falling to each. The portion known as "Santa Gertrudis" was declared to belong to Josefa Cota, the widow of Antonio Maria. By the same decree the Governor directed

that juridical possession be given to the respective parties, and that a copy of the decree be furnished to them to protect their rights until the title papers could be prepared. This decree is preceded by a recital of the considerations operating upon the mind of the Governor to make it. The translation of this portion, as given in the report in 7 Cal. 580, is as follows: "*Having seen* the present petition, and having known from public notoriety the peaceable and undisturbed possession which has been enjoyed by Manuel Nieto and his heirs of the land described on the map; *having seen* the proceedings wherein was contained the *grant* of said land by his Excellency Governor Pedro Fages to the said Nieto, complying with every requisite deemed necessary, in strict conformity with the laws and regulations upon such subjects, under the considerations expressed therein, they are declared owners in fee simple." This translation is inaccurate. As translated, the recital conveys the impression that the Governor had actually seen a grant from Fages, and was regarded by Mr. Chief Justice

Murray, in his opinion, as containing a statement [486] to that effect. \*(7 Cal. 533.) But the words trans-

lated by the terms "having seen," in both instances where they occur, do not refer to any inspection of the petition and proceedings, but only mean that in consideration of them he acted, and might be properly translated by the terms "in view of," or "considering" them. And the word translated by the term "grant" does not necessarily import an absolute transfer of the land, as appears to have been considered in the opinion referred to. It should be translated by the term "concession," and is as applicable to the license under which the Court finds that Manuel Nieto entered as to a transfer of the title.

On the twenty-first of December following, the Governor made a further decree, directing the execution of the titles, and the delivery of juridical possession; and on the twenty-second of May, 1834, issued grants to the different parties. The one issued to Josefa Cota recites that she had shown herself entitled to the estate of the deceased Manuel Nieto, and declares the ownership of the place called "Santa Gertrudis" to be in her, and directs that she be put in legal possession thereof. The grant is subject to the usual conditions

of grants in colonization. It requires her to submit to the regulations made for the distribution of the vacant lands; it prohibits any alienation or division of the premises granted; it confers a right of possession; it requires the construction of a house within a year; it reserves any surplus over the designated quantity to the uses of the nation; and it subjects the right of the grantee to forfeiture upon non-compliance with the conditions annexed.

In March, 1835, juridical possession of the tract thus granted was delivered to the grantee, and from the time the grant was issued until December, 1843, she resided with her children upon the premises. In 1843, being in indigent circumstances, and unable to support her family, or maintain the possession of the property, she applied to the Alcalde of Los Angeles, who was then invested with the powers of a Judge of the Court of First Instance, to authorize a sale of the premises to the defendant. The Alcalde hesitated in regard to his authority, as the grant contained a condition in restraint of alienation, and consulted the Governor upon the subject. The grantee also applied to the Governor for an order for the sale. Thereupon the Governor directed the Alcalde to \*authorize the grantee to make the [487] sale; and also directed him, when there was a condition of non-alienation in a grant, to disregard the same in his official acts. Under this direction, the Alcalde authorized the sale, acting in that respect and in making the sale, as Notary Public. The premises were accordingly conveyed to the defendant, in December, 1843, for a full and valuable consideration, and formal possession was delivered to him. The sale was made with the knowledge of the plaintiffs, and without any objection from them. At the time, the defendant had no notice of any title other than that derived from the grant of Figueroa, and from the date of his purchase he continued to possess and enjoy the premises without disturbance by any one, and until the institution of the present action, in January, 1853, without the assertion of any adverse title. During this period he made valuable improvements upon the property. In 1847 Josefa Cota died.

Upon these facts the plaintiffs seek to recover, and they rely:

1st. Upon presumptions of title arising from the ancient possession of their ancestors;

2d. Upon the averments in the petition of Grijalba, and the recitals in the decree and grant of Figueroa, as estopping the grantee, and parties claiming under her, from denying that the title to the premises was originally in Manuel Nieto, and afterwards in his children; and

3d. Upon the operative words of the grant, as-establishing that the grant was issued in confirmation of a previously existing title in the heirs of Nieto, and not as a concession of a title existing at the time in the Government.

In considering these positions we do not feel any embarrassment from the views expressed by the Court when the case was here at the April Term of 1857. The whole stress of the opinion of the Chief Justice rests upon an inaccurate translation of the decree of July 27th, 1833. "The findings of the Court below," says the Chief Justice, "that Manuel Nieto, the ancestor of the plaintiffs, entered into possession by virtue of a permission or license from the Spanish Government to graze his cattle thereon, and not under a deed or grant, is undoubtedly correct, if drawn alone from the parol evidence adduced to rebut the presumption of a grant, [488] which \*would arise from his ancient possession and occupation, for the presumption of a grant arising from these circumstances, like any other presumption, may be rebutted by proof. The finding of the Court, however, in the present case, as we think, was against the legal effect of the decree of July 27th, 1833, which expressly recites that the land in question had been *granted to Nieto*, and that he (the Governor) had *seen the proceedings* wherein was contained the grant of said land by his Excellency Governor Pedro Fages. Admitting, for the sake of the argument, Nieto never had any title to the land in dispute, except a mere permission to occupy—in other words, that he was a mere tenant at will of the Spanish Crown—still it cannot be denied that even if the fee was in the Government of Mexico, at the date of this decree, she would be estopped from denying the title of Manuel Nieto and his heirs. In other words, whether the land belonged to Mexico or not, Figueroa, as the political chief of the territory, had the authority to bind the Govern-



ment by his acts or admissions in relation to the public lands, and having by a solemn decree declared *the title of said lands was originally in Manuel Nieto*, the Government was estopped from denying such admission or regranting the premises to another."

This extract shows that the Court, relying upon the correctness of the translation, held that a declaration of the Governor that the property had been absolutely granted to another, and that he had seen the grant of the property, operated as an estoppel against a subsequent denial of the alleged fact by the Government. But as it appears from an inspection of the original document no such fact was in truth averred, the ruling based thereon can have no application in the determination of the case as now presented. We admit that a previous ruling of the Appellate Court upon a point directly made is, as to all subsequent proceedings, a final adjudication, from the consequences of which the Court cannot depart, nor the parties relieve themselves. (*Phelan v. San Francisco*, 20 Cal. 39.) But such ruling, if relating to a matter of fact, can only be invoked when the fact reappears under the same circumstances in which it was originally presented. The document now before us neither reads nor means the same thing as when examined by the Court on the first appeal. We proceed, then, to the consideration of the propositions presented by the plaintiffs.

\*1. They insist that the long uninterrupted pos- [489] session of their ancestors—that of their grandfather, Manuel Nieto, from 1784 to 1804, a period of twenty years; and that of their father, Antonio Maria Nieto, from 1804 until his death in 1832, a period of twenty-eight years—raises a presumption of title sufficient to maintain the present action. To this position there is a perfect answer. Presumptions are only indulged to supply the absence of facts. There can be no presumptions against ascertained and established facts. Here the original entry and subsequent occupation of Manuel Nieto were under a mere permission to graze cattle, and not under any grant of title, and his children continued the occupation under the same permission. This is clear from the evidence, and is found as a fact by the Court. The presumption, therefore, of a grant from the long possession, is re-

pelled and destroyed by the production or proof of the contents of the instrument under which the possession was held. The children, it is true, of Manuel Nieto claimed after his death to be the owners of the premises; but the assertion of this claim only shows an erroneous impression on their part of the rights conferred by the permission to their father. The fact found is that they occupied under the permission. The claim asserted arose, therefore, from a mistaken construction of the effect of the permission in transferring the title.

Nor could any title accrue by prescription to the ancestors of the plaintiffs from their occupation under the permission in question. Under the Spanish law, where title by prescription is founded upon possession under a written instrument, it is essential that the instrument should purport on its face to pass the title. "There is a good deal of confusion," says the Supreme Court of Louisiana, "and some apparent contradiction in the books which treat of the title necessary to form the basis of the prescription *longi temporis*. The correct doctrine, we think, is this: that if the title, under which the acquisition is made, be null in itself, from defect of form, or discloses facts which show the person from whom it is acquired has no title, it cannot form the basis of this prescription, because the party acquiring must be presumed to know the law, and consequently wants the *animo domini*, which is indispensable in cases of this kind. But where the

[490] title is free from these defects, and the \*property is not transferred, by want of title in the party making the transfer, then it forms a good ground for the prescription; or, in other words, the inquiry is, whether the error be one of fact or of law." (*Frique v. Hopkins*, 4 Martin's N. S. 224.) The ordinary requirements of prescription, according to the Spanish law, are four: 1st, just title; 2d, good faith; 3d, continued possession; 4th, the time fixed by law. "By just title," says Sala, "which is also called colorable title, we understand anything which, if it issue from the lord of the thing, may transfer the dominion; that is to say, sale, exchange, donation, institution of heir, and others, are just; but deposit, lease, loan, are unjust; because, although they issue from the true lord, the latter did not by them propose to transfer the dominion." (*Sala Mexicano*, 2, p. 76.)

A similar rule prevails at the common law, where an adverse possession under a written instrument is asserted. Instruments which on their face do not purport to transfer the title, as leases, cannot be the foundation of an adverse possession. Contracts to convey, where the consideration has been paid, and which equity would specifically enforce, constitute perhaps an exception. (*Frombois v. Jackson*, 8 Cowen, 589.) The possession of an occupant is, in the first instance, presumed to be rightful and adverse to any other claimant. But "the presumption which the law thus raises in favor of the actual occupant," says one of the Senators in his concurring opinion in the case cited, "may be destroyed by proof of his having a lease or evidence of his having paid rent, or acknowledged the title set up; or it may be destroyed by showing that the occupant entered without pretending to any claim of right whatever; in which case the law adjudges the possession to be in subservience to the legal owner, (16 John. 301,) for he can derive no benefit from a legal presumption, who, by his own acts, shows that the presumption cannot apply; the fact that no claim of right was made showing that none existed." (8 Cowen, 617.)

To establish a prescriptive title under the Spanish law, or to constitute a foundation for adverse possession at the common law, the instrument under which the occupant entered and claims the premises must purport in its terms to transfer the title—must be such as would, in fact, pass the title had it been executed by the \*true owner and in [491] proper form, (with the exception, perhaps, of a contract to convey after payment of the consideration,) and the occupant must have entered under it in good faith, in the belief that he had a good right to the premises, and with the intention to hold them against the whole world. The possession must have been adverse in its inception and during its continuance.

2. There is nothing in the averments of the petition of Grijalba which can estop Josefa Cota, or the defendant claiming under her, from denying that the title to the premises was originally in Manuel Nieto, and afterwards in his children. It does not appear that Grijalba was authorized to act for Josefa. He does not profess to thus act, nor is it shown that

she had ever seen the petition to the Governor, or knew of its contents. But even if the facts were otherwise, and she had seen the petition and knew its contents, we do not perceive that any estoppel would be created against her. The petition is no part of the grant. It is only the declaration of the party who made it, or of the party by whose authority it was made. Like any other declaration, it is open to explanation. The grant is the operative instrument, and the representations made to the Governor cannot control the course or nature of the title. If those representations were in truth erroneous, and the mistake in them affected the grant in any respect, the fact could only be made available by the Government. But the truth is, the averments of the petition are to be considered, like the claim of ownership made by the children of Manuel Nieto after his death, in connection with the established fact, that the children occupied under the permission granted to their father; and thus considered, the averments are only the erroneous conclusions of Grijalba as to the legal effect of the permission in transferring the title. Such erroneous conclusions may very well have been drawn by him, as the nature and character of the permission could only be stated from recollection, the original paper having been lost. The "testimonial" furnished of the evidence found in the archives in reference to the alleged ancient title, appears, from the petition, to have been only sufficient to prove the legality of the occupation of the premises. It could not have shown a transfer of the fee of the property, for, in that event, it is not to be supposed that any new or further grant would have been sought.

[492] \*The recital in the decree of July 27th, 1833, made upon this petition, when correctly translated, is entirely consistent with the fact that a mere provisional license to occupy and graze had been issued by Governor Fages. The term translated "grant" would, as we have already stated, be more correctly rendered "concession." And the provisional permission to Manuel Nieto was as strictly a concession as would have been an absolute grant. This concession and the long occupation of the parties may very well have induced Governor Figueroa to vest in them the title. His power under the colonization laws and regulations author-

ized him to cede the land if the title still remained in the Government. He knew, or might have known, whether it did thus remain. He assumed that it did and acted accordingly, and declared the parties owners of different parcels of the premises, pursuant to a verbal partition made between them, and directed juridical possession to be delivered to them. It is, evidently, as counsel very justly observe, a fair presumption that the Governor understood the laws he was administering and the jurisdiction he had over the premises, and a very violent presumption that he would declare the ownership of particular lands to be in Josefa Cota when the title was already vested in others, and he had no power or disposition over it. We agree with counsel that the more reasonable presumption is that he knew and intended to recite the consistent truth.

The recital in the grant to Josefa Cota, that she had shown herself entitled to the estate of the deceased Manuel Nieto, does not show that any title had previously been issued to him. The estate to which reference is thus made was only the interest which Nieto had acquired by his license to occupy. Whatever rights that gave, Josefa, according to the recital, had shown herself entitled to. The recital operates in all its particulars, if at all, and not merely in some of them. If it estop the grantee from denying a previous title in Manuel Nieto, it equally shows that she had in some way become invested with such title, whatever it may have been.

3. There is nothing in the operative words of the grant to Josefa Cota which show that the grant was issued in confirmation of a previously existing title in the heirs of Nieto, and not as a concession \*of a title existing at [493] the time in the Government. The words used "declaring to her the ownership" of the premises, when taken in connection with other parts of the instrument, clearly show a transfer of the property. A similar position to that of the plaintiffs' counsel was taken before the Board of Land Commissioners when the grant was under consideration by that tribunal, and it was held untenable. "The grant," says the opinion of the Commissioners, "in its terms is totally inconsistent with such a supposition. If he (the Governor) regarded the title of these heirs already perfect in the land,

how could he annex the conditions which this grant contains? How could he declare a title already perfect forfeited, if a house was not built upon the place within a year? How make a compliance with the terms of a future colonization law a condition of the holding of that estate? If he regarded this title as already perfect, the heirs already invested with an indefeasible estate under the former grant, one which withdrew the land from his authority, under his power to grant the national domain, he could no more annex conditions to that title, and declare it null if they were not performed, than he could abolish the title altogether and unconditionally. The truth is, that the whole record shows that he did not regard the rights of the parties under any concession made by Fages as establishing private ownership and title in them, and making a new grant both unnecessary and without validity. Instead of showing an admission of Governor Figueroa of such prior title, under the grant from Fages, it presents conclusive evidence that he regarded such a grant, whatever it was, as having no such effect, but on the contrary he proceeded to make a concession of the premises, on the principles and under the conditions provided in the law of 1824, and the regulations of 1828, from which he derived his power over the subject.

“The concessions under the Spanish authority, made in the Californias before the Independence of Mexico, do not purport to be perfect titles; at least none of that character have fallen under the notice of this Commission. One only has received confirmation, and that on the ground that an equitable, though not a legal title, was established. The old grants were generally mere rights of possession or provisional grants, and in almost every case, when the

[494] \*Government was established after the Mexican revolution, the parties applied for new grants, which they received, not as a mere evidence of a former subsisting title, but in the form, and under the terms, and subject to the conditions imposed by the law of 1824 and the regulations of 1828. Under these, the power of the Governors over the public domain was defined. It was a power to grant under certain conditions, not a power to recognize and give new evidences of private titles already existing without conditions

or limitations. He had entire discretion as to choice of grantees, and this power enabled him to do most ample justice to persons who held under provisional grants previously issued, or who occupied without a shadow of title, or the right to the possession. All these presented themselves to the new authorities for concessions under the new order of things, and usually received grants for the ancient possession. The archives of this Commission are full of such documents, and the custom was all but universal."

The views we have thus expressed dispose of the case on the part of the plaintiffs, and render it unnecessary to consider the numerous objections urged to a recovery by the defendant. The title vested in Josefa Cota by the grant to her. The motives which induced the action of the Governor do not affect the title. As counsel observe, the title lies in the grant and not in the motives.

The Governor had authority to remove the restraint upon the alienation of the premises contained in the first condition of the grant, and the subsequent sale of the grantee to the defendant passed the title to him absolutely.

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\***MCCARTHY v. WHITE et al.**

[495]

<sup>1</sup> **LIMITATION OF ACTION ON NOTE BARS THE MORTGAGE.**—Where an action upon a promissory note, secured by a mortgage of the same date upon real property, is barred by our Statute of Limitations, the remedy upon the mortgage is also barred. *Lord v. Morris*, 18 Cal. 482, affirmed on this point.

**STATUTE OF LIMITATIONS IS A STATUTE OF REPOSE.**—It is not a correct theory of the Statute of Limitations that the expiration of the period fixed by it raises a presumption of payment, and that the effect of an acknowledgment is to rebut this presumption. The statute is to be regarded as one of repose, the benefit of which may be relinquished by the party interested, but cannot be taken from him without his consent.

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<sup>1</sup> Affirmed in *Heinlin v. Castro*, 22 Cal. 102; *Cunningham v. Hawkins*, 24 Cal. 409; *Willis v. Farley*, Id. 498; *Low v. Allen*, 26 Cal. 144; and cited as authority in *Coster v. Brown*, 23 Cal. 143; and see *Ord v. McKee*, 5 Cal. 516; *Peters v. Jamestown B. Co.*, Id. 336; *Guy v. Ide*, 6 Cal. 101; *McMillan v. Richards*, 9 Cal. 409; *Naglee v. Macy*, Id. 428; *Hafley v. Maier*, 13 Cal. 14; *Johnson v. Sherman*, 15 Id. 293; *Grattan v. Wiggins*, 23 Cal. 25; *Coster v. Brown*, Id. 144; *Arrington v. Liscom*, 34 Cal. 369; *Wright v. Ross*, 36 Cal. 434; *Cunningham v. Hawkins*, 24-409; *Lent v. Shear*, 26-365; *Sichel v. Carillo*, April, '69; *Wood v. Goodfellow*, Oct. '70, Jan. '72; *Belloc v. Davis*, 38 Cal. 242.

**JOINT OBLIGORS—EFFECT OF ACKNOWLEDGMENT BY ONE.**—If two or more persons are bound, the statute affords the same protection to each, and an acknowledgment by one is not available against another, unless he had authority to make it, either expressly given or resulting from the relation of the parties.

\* **LIMITATION OF ACTION ON ENFORCEMENT OF SECURITY.**—The principles which govern as to the operation of the statute, and the effect of an acknowledgment, in cases of personal liability, are equally applicable to cases where an attempt is made to enforce a security.

\* **GRANTEE OF MORTGAGOR MAY PLEAD STATUTE OF LIMITATIONS.**—A party who, subsequent to the execution of a mortgage, purchases the property from the mortgagor, may avail himself of the Statute of Limitations as a defense to an action for the foreclosure of the mortgage commenced after the statute has run against the debt secured.

**IDEM.**—W. and K. owning a tract of land in common, W., in 1853, mortgaged his interest in a portion of the tract, containing four hundred and eighty acres, to M., to secure a note executed at the same time, and falling due March 4th, 1854. April 3d, 1856, W. and K. entered into a written agreement for the partition of the whole tract, by which the four hundred and eighty acres mortgaged was to belong exclusively to K., W. stipulating to make him a deed of the same as soon as it could legally be done. May 10th, 1858, M. and W. had an accounting, and signed a writing stating that there was a balance of \$1,706 60 then due on the note, and that the time of payment was extended to January 1st, 1859. April 8th, 1859, W., in pursuance of the agreement of 1856, executed a deed of the premises to K., who had notice of the previous transactions between W. and M. The agreement between W. and K. in 1856 was not recorded, nor did M. have actual notice of its existence until after May 10th, 1858. In an action by M. to foreclose the mortgage, in which K. set up as a defense the Statute of Limitations: *Held*, that this defense was available to him by reason of his interest in the property acquired under the agreement of 1856; that he was not affected by the acknowledgment made by W. in 1858; that the want of knowledge of K.'s purchase by plaintiff when he received W.'s acknowledgment, and extended the time of payment, was not material, for the reason that the period of limitation had already expired, and that plaintiff gave no consideration for the acknowledgment.

**IDEM.**—*Held, further*, that if the debt had not been barred at the time of W.'s acknowledgment, the position of the plaintiff would have been different; that having no notice of the agreement of purchase, if he had suffered the statute to run, relying upon the acknowledgment, he would have been entitled to protection.

[496] **FRAUD NEVER PRESUMED.**—\*It is never presumed that a party has committed a fraud; and where fraud is alleged, for the purpose of depriving him of a right, it must be clearly made out.

**IDEM—FORECLOSURE OF MORTGAGE.**—Thus, in the case above stated, the lower Court having found as a fact that K. was the agent of plaintiff, and acted as such in procuring the note and mortgage, and receiving interest upon the note, but without stating more particularly the duties devolving upon him as agent, the Appellate Court refused to infer from this that his duties as agent were of a character which prevented him from contracting in relation to the property on which the debt was secured.

\* That the statute applies as well to cases in equity as at law, approved in *Grattan v. Wiggins*, 23 Cal. 34; and see *Pearis v. Covillaud*, 6 Cal. 617, and *Lord v. Morris*, 18 Id. 487; *Jeffers v. Cook*, 58 Cal. 151; *Henderson v. Grammar*, 66 Cal. 336; 43 Cal. 183.

\* Cited as authority in *Grattan v. Wiggins*, 23 Cal. 25; *Coster v. Brown*, Id. 143; *Wood v. Goodfellow*, Oct. T. 1870 (not reported.) Affirmed in *Lent v. Shear*, 26 Cal. 365; and see *Low v. Allen*, 26 Cal. 144; *Lent v. Morrill*, 25 Id. 500; *Barber v. Babel*, 36 Id. 11; *Sichel v. Carillo*, April T. 1869 (not reported.)



## APPEAL from the Third Judicial District.

On the first day of March, 1853, W. F. White executed to plaintiff a promissory note for \$2,400, payable one year from date, and bearing interest at two per cent. per month. To secure this note, White executed a mortgage upon an undivided one-half interest in a lot of land in Santa Cruz county, this lot being a part of the Salsipuedes Rancho, and designated upon a map of that rancho, made for the purposes of a partition, as lot "H." The mortgage was dated March first, but was acknowledged April 27th, and recorded June 9th, 1853. At the time of its execution, Eugene Kelley was the owner in common with White of the lot mortgaged, and also of an adjoining lot, marked on the map lot "I," each owning equal undivided interests in the entire tract. On the second day of April, 1856, White and Kelley executed a written agreement for the division of the premises above mentioned, which, after reciting that they were jointly seized, and referring to the partition map as designating the tract thus held, proceeds: "And whereas the parties to this agreement are desirous of dividing said land, and have agreed to the following division, (which agreement shall be carried out by an exchange of deeds as soon as it can legally be done,) viz., the party of the second part (Kelley) agrees to deed to the party of the first part," etc., describing a part of lot "I;" "the party of the first part (White) agrees to deed to the party of the second part," etc., describing the other part of lot "I," "and also lot 'H,' stated to contain about four hundred and eighty acres." Under this agreement, Kelley immediately took possession of lot "H," and has since retained it.

\*May 10th, 1858, more than four years having then [497] elapsed since the note fell due, plaintiff and White had an accounting concerning it, and both signed a writing which, after a statement in the form of a debt and credit account of the interest which had accrued, and the payments made, up to April, 1858, showing a balance then due of \$1,706 60, continued: "This is all that is due on said eighteenth day of April last on the note secured by mortgage, and is by the parties hereto the admitted balance. The said Mc-

Carthy further agrees not to force the collection of the above balance before the first day of January, 1859." At the time of this transaction plaintiff had no knowledge of the agreement made in 1856 between White and Kelley. Deeds were executed between Kelley and White, in pursuance of their division agreement, on the eighth of April, 1859, Kelley then receiving a conveyance of lot "H," which was acknowledged and recorded, and having knowledge at the time of the previous transactions between White and plaintiff.

This action was commenced October 28th, 1859, by plaintiff to foreclose the mortgage, White and Kelley being both made parties. Kelley set up as a defense against the enforcement of the mortgage the Statute of Limitations. The Court found the facts substantially as above stated; and also found that plaintiff left the State in 1853, and was absent until the spring of 1858, and that Kelley acted as his agent in taking the mortgage, and in the management of his business during his absence. The plaintiff had judgment in the Court below, and defendant appeals.

*W. W. Stow*, for Appellant.

I. The agreement for the exchange of lots "H" and "I" was valid, and the exchange was a valuable consideration, making Kelley the purchaser of "H" for a valuable consideration (of course with notice of the then condition of plaintiff's mortgage) as much so as if he had paid the purchase money in coin. (Willard's Eq. Jur. 610; 1 Wend. 625; 6 Johns. Ch. 402; 6 Barb. 484.) In equity, on the execution of said agreement of April, 1856, Kelley was the beneficial owner of the whole of lot "H," incumbered with plaintiff's mortgage. (*Merrill v. Judd*, 14 Cal. 59; Willard's Eq. Jur. 610, and cases cited; 6 Barb. 484, 485.) And as plaintiff in-  
[498] vokes \*equity to foreclose his mortgage, he must consent to equitable rules being applied to the case.

The *status* of plaintiff and defendant Kelley, April, 1856, was, (in equity): Kelley owned lot "H," plaintiff had a mortgage on the undivided one-half to secure the payment of White's note; the mortgage was the incident to the debt—the debt being paid, the mortgage was discharged. (*Payne v. Bensley*, 6 Cal. 99; *McMillan v. Richards*, 9 Id. 409-411;

*Dill v. Byrne*, 5 Id. 455; *Ord v. McKee*, Id. 515; 4 Id. 224, 502; *People v. Chisholm*, 8 Id. 30; 6 Id. 478; 11 Id. 13; *Daly v. Graham*, 12 Texas, 427; *Sherman v. Dunbar*, 6 Cal. 478.) White was then (and still is) the principal debtor, and the land the surety. (Adam's Eq.; 12 Ala. 509; Willard's Eq. Jur. 453.) And this emphatically so, because the mortgage constituted no part of the purchase money to be paid by Kelley in exchange of "H" for "I," nor did the agreement or White's conveyance impose (by its terms) the payment of the mortgage upon the land.

II. Plaintiff's remedy for the foreclosure of this mortgage is barred by the Statute of Limitations. In other words, on the second of April, 1856—the date of the agreement between White and Kelley—Kelley took the land subject (used in the sense incumbered) to plaintiff's mortgage. A part of his contract, made by the statute of the State, was that the mortgage should be enforced by the third of March, 1858, or not at all. (*Lord v. Morris*, 18 Cal. 482.) The California statute makes no difference or distinction between the time when a debt secured by mortgage and any other debt will be barred or outlawed. (Wood's Dig. 47, sec. 17.) "Actions other than those for the recovery of real property can only be commenced as follows: within four years, an action upon any contract, obligation, or liability, founded upon an instrument of writing," etc. The note described in the complaint is an instrument in writing; an obligation for the payment of money; it creates a liability; it is a contract. (*Fairbanks v. Dawson*, 9 Cal. 90; *Lord v. Morris*, 18 Id. 482.) The mortgage is also an instrument in writing, and of no higher grade, because it has a seal, than the note. (*Ortman v. Dixon*, 13 Cal. 33-36.) The Statute of Limitations is, in this State, to be enforced on the \*equity side of the [499] Court as well as on the law side. (Angell on Limitations, sec. 467; *Chalmendelay v. Clinton*, 2 Jacobs & Walker's Ch. 1; 10 Wheaton, 152; *Lord v. Morris*, above cited.) The general doctrine is that a mortgage will outlaw, and all remedies upon it become barred by the Statute of Limitations. (Angell on Limitations, secs. 453-455, 93; Lord Thurlow, in 3 Brown's C. C. 291; *Palmer v. Eyer*, 6 Eng. Law and Eq. 335; *Giles v. Barmore*, 5 Johns. 545; *Waterman*

v. *Haskin*, Id. 283; *Jackson v. Wood*, 12 Id. 242; *Jackson v. Myers*, 3 Id. 382; 9 Wheat. 497; 19 Vt. 526; 7 Paige, 465; 8 Met. 87; 3 Kelly, Ga., 850; 6 B. Mon. 479; *Hunter v. Levin*, 11 Cal. 11.) A promissory note secured by a mortgage does not render it a specialty, and hence it outlaws, or is barred by the statute, like any other promissory note. (Angell on Limitations, sec. 92; *Jackson v. Sackett*, 7 Wend. 94; *Clark v. Figer*, 2 Stark. 234; 3 Eng. Com. Law; 11 Cal. 11.)

III. The remedy upon the note and mortgage having been barred, it was not renewed by the subsequent written promise of White, the mortgagor.

The land (thing) bound for the payment of the debt being the property of Kelley at the time of the new promise, White's new promise could not bind it or renew a lien once lost. "No acknowledgment or promise shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation of this statute unless the same be contained in some writing signed by the party to be charged thereby." (Construed in *Fairbanks v. Dawson* and *Lord v. Morris et al.*, above cited.)

The land (the person, thing) "to be charged" by the new promise could not sign the new promise. Who could sign for the land, so as to charge it? Clearly no one but a person holding an estate, in this instance, Kelley. White might as well attempt to create a lien on any other lands of Kelley, in which he never had an interest, as on this. (*Lord v. Morris*, 18 Cal. 482; Angell on Limitations, sec. 460; 7 Paige's Ch. N. Y. 465; 9 Wheat. U. S. 490; *Hope v. Bogert*, 1 Hilt. N. Y. 545; 7 Barb. 445; 2 Ker. 635.)

If the proposition before laid down, "that White [500] was the principal debtor, and the land the security after the agreement of April 2d, 1856," (Willard's Eq. J. 453; *Lyon v. State Bank*, 12 Ala. 509; *Lowther v. Chappell*, 8 Id. 353,) be law, then the principal could not make a new promise to bind the surety, and *vice versa*.

It seems to us White's new promise at the time it was made is like the new promise of one partner after the dissolution of the partnership, binding on the promissor, but not on his co-partners. (*Van Kewen v. Pamlee*, 2 Comst. 532; *Bell v. Morrison*, 1 Pet. 351.)

IV. No doctrine of equity can be invoked in favor of plaintiff to sustain his right to enforce this new promise against Kelley's land. He parted with nothing in consideration of the new promise. He lost nothing by the new promise, because it was made after his right to enforce the old promise was barred. He did not take the new promise in good faith, as Kelley was in possession. He could not have taken a new mortgage or a deed from White and have been a purchaser for value without notice. (*Hunter v. Watson*, 12 Cal. 363.) He was in the State, and had a right to foreclose the mortgage before it outlawed. No deceit was practiced on him by Kelley. He was bound to know the law. Kelley's title to the land accrued before the mortgage was outlawed.

*G. F. & W. H. Sharp*, for Respondent.

Plaintiff's right to foreclose the mortgage as against Kelley was not barred by the Statute of Limitations.

I. Kelley was the attorney in fact of plaintiff, and obtained the mortgage from White as plaintiff's attorney. Kelley is therefore estopped from setting up an adverse right or title to the mortgaged premises during the time he was acting as the attorney in fact of the plaintiff. (See *Hostler v. Hayes*, 3 Cal. 306, 302; 8 Id. 115, 25; 9 Id. 205, 606; 1 Parsons on Contracts, 74, and cases there cited in note *d*.)

II. The plaintiff is entitled to relief as against Kelley on the ground of fraud, and it would be against public policy and good faith to permit Kelley to defeat him. (6 Cal. 607, 665, 673; 7 Id. 509; 8 Id. 89, 226, 128; 9 Id. 574; 13 Id. 69, 102, 127, 170; 2 Greenl. on Ev., sec. 448 and note 3.)

\*III. The facts presented in the record in this [501] case take it out of the rule adopted by this Court in construing the Statute of Limitations laid down in the case of *Lord v. Morris*, 18 Cal. 482.

COPE, J. delivered the opinion of the Court—FIELD, C. J. and NORTON, J. concurring

This is an action to foreclose a mortgage executed by the defendant, White, upon certain real estate in the county of Santa Cruz. There are several defendants, and among them is one Eugene Kelley, who claims the premises under a con-

veyance from White, and relies upon the Statute of Limitations as a bar to the foreclosure. The mortgage debt became due on the fourth of March, 1854, and on the tenth of May, 1858, a portion of the debt having been paid, the parties had an accounting, and upon ascertaining the balance due, executed a writing by which it was agreed that payment of such balance should not be enforced until the first of January, 1859. The premises were conveyed to Kelley on the eighth of April, 1859, and the conveyance was taken by him with notice of the previous transactions between White and the plaintiff; an agreement to convey, however, having been entered into on the third of April, 1856. The Court finds that this agreement was not recorded, and that the plaintiff had no notice of it; that he left the State in 1853, and was absent until the spring of 1858; and that Kelley acted as his agent in taking the mortgage, and in the management of his business during his absence. The action was commenced on the twenty-eighth of October, 1859.

The case of *Lord v. Morris*, 18 Cal. 482, settles the question of the application of the statute, and the only inquiry is whether the writing of May, 1858, takes the case out of its operation. There is no doubt that it does so as against White, but Kelley contends that it is ineffectual as against him, he being the equitable owner of the property under the agreement of 1856. The property is an undivided interest in a part of a tract of land, which belonged originally to White and Kelley jointly, and the object of the agreement was to provide for a partition of the land. It set forth the terms of the partition, and stipulated for an exchange of deeds, fixing no time, however, at which the exchange should be [502] made, \*but stating generally that it should be made as soon as it could be legally done. The interest covered by the mortgage was to be deeded to Kelley, and the effect of the agreement was to vest in him a right to a deed upon the performance of the consideration on his part. This right constituted an interest in the property adverse to the mortgage, and when the statute had run, and a right of action upon the mortgage no longer existed, it was not in the power of another to create one as against him. The most that can be claimed for the writing is that it was an acknowl-

edgment of the debt, and treating it as such no effect can be given to it except as between the parties. We say this, of course, upon the assumption that Kelley is under no disability in regard to the agreement, and for the present we shall consider the case without reference to the objections taken in that respect. For the purposes of the case, we shall assume that the acknowledgment, so far as it is operative at all, takes the case out of the statute in respect to the mortgage as well as the debt. It was formerly held that statutes of this nature proceeded upon a presumption of payment, and that the effect of an acknowledgment was to rebut this presumption and place the debt upon its original footing. This view is now exploded, and the statute is universally regarded as one of repose, the benefit of which may be relinquished by the party interested, but cannot be taken from him without his consent. If two or more persons are bound, the same protection is afforded to each, and an acknowledgment by one is not available against another, unless he had authority to make it, either expressly given, or resulting from the relation of the parties. The effect of the statute in this respect is perfectly well settled, and it is immaterial, of course, whether the original liability was personal and direct, or resulted incidentally from a charge upon property. In cases of personal liability, the doctrine, as we have stated it, is conclusively established, and the principle is equally applicable in a case of this character, where an attempt is made to enforce a security. It is clear, therefore, that the plaintiff cannot avail himself of the acknowledgment as against Kelley, unless the circumstances of the case are such as to preclude Kelley from relying upon the agreement. It appears that the plaintiff was ignorant of its existence, but as he parted with \*nothing in consideration of the acknowl- [503] edgment, he is not in a position to complain on that ground. It is not enough that he acted in good faith, and without notice. The acknowledgment cost him nothing, and his rights under it are not those of an incumbrancer for value. If the debt had not been barred, the position of the plaintiff would be different; having no notice of the agreement, if he had suffered the statute to run, relying upon the acknowledgment, he would be entitled to protection. As the debt was

barred, however, he cannot claim that his rights have been prejudiced by the want of notice, for the acknowledgment gave him none which could possibly be affected by it.

The question in regard to the agency is a more difficult one; but looking solely to the findings, we cannot see that Kelley is under any disability on that account. Until the mortgage was barred the agreement had no effect upon it; and so far as appears, there was no conflict between the duties of Kelley as agent and his interest as a party to the agreement. An agent is not allowed to place himself in antagonism to his principal in the business of his agency, and as against the principal he can derive no benefit from contracts made by him in violation of this rule. It must appear, however, that the rule has been violated, and we are not to indulge presumptions upon the subject for the purpose of depriving a party of the fruits of his engagements. The Court finds in regard to the agency nothing but the fact of its existence, and the receipt of interest upon the mortgage debt, the particular duties devolving upon Kelley, as agent, not being stated. We cannot infer that these duties were of a character which prevented him from contracting in relation to the property upon which the debt was secured; the presumption is that they were not. It is never to be presumed that a party has committed a fraud, and where fraud is alleged for the purpose of depriving him of a right, the facts sustaining it must be clearly made out. The charge here is that the agreement was a fraud upon the plaintiff and an act of bad faith on the part of Kelley, but the facts found do not show it to have been so.

The point made in regard to the absence of Kelley from the State is not properly before us, as there is nothing in the findings upon the subject.

The judgment is reversed, and the cause remanded for a new trial.

[504] \*NORTON, J.—I concur in the decision of this case, upon the ground that both the questions upon which there could be any argument upon principle have been decided by this Court in the case of *Lord v. Morris*, and that these are questions of that character that once deliberately



decided, and after having stood for several years as rules to govern transactions, they should not be opened merely to consider again the weight of conflicting decisions and opposing reasons.

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RICO *et al.* v. SPENCE *et al.*

- <sup>1</sup> **QUIETING TITLE—POSSESSION OF PLAINTIFF ESSENTIAL.**—To maintain an action to quiet title, under the two hundred and fifty-fourth section of the Civil Practice Act, it is essential that the plaintiff have possession of the premises when the action is commenced.
- <sup>2</sup> **IMPEACHMENT OF PATENT.**—Until the validity of a grant from the Spanish or Mexican Government has been determined by the tribunals of the United States, under the Act of Congress of March 3d, 1851, it cannot be made the basis for impeaching a patent for the same premises.
- <sup>3</sup> **PATENT CONCLUSIVE.**—Thus, where the validity of the claim of the defendant, under a Mexican grant, had been recognized and confirmed, and a patent to him issued thereon by the United States: *Held*, that the plaintiff, relying solely upon an opposing unconfirmed grant from the Mexican Government, embracing the same premises, could not call in question the rights of the defendant, either in law or equity.
- <sup>4</sup> **EFFECT OF NON-PRESENTATION OF MEXICAN GRANT.**—Where claimants under Spanish or Mexican grants have never presented their claims for confirmation, under the Act of March 3d, 1851, such claims are to be treated as non-existent, and the land, so far as they are concerned, is to be considered as part of the public domain.
- MEXICAN GRANTS, ADVERSE CLAIMS TO.**—Where the parties each claimed the same premises under independent Mexican grants, and the defendant, with knowledge of the plaintiff's claim, proceeded to obtain a confirmation of his claim and a patent therefor: *Held*, that no equities could arise in favor of the plaintiff, and against defendant, from the latter's knowledge of the adverse claim, nor was he, by reason of this knowledge, affected with notice of any equitable rights of the plaintiff.

APPEAL from the Third Judicial District.

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<sup>1</sup> Affirmed in *Lyle v. Rollins*, 25 Cal. 437; *Pratus v. Jefferson G. & S. M. Co.*, 34 Cal. 559. See also *Van Winkle v. Hinckle*, ante 342; *Brooks v. Calderwood*, 34 Id. 565; *Sepulveda v. Sepulveda*, 39 Id. 18; *Nev. Co. & S. C. Co. v. Kidd*, 37 Cal. 307; 4 Sawy. 544.

<sup>2</sup> Cited as authority in *Banks v. Moreno*, 39 Cal. 246; and cited inferentially in *Salmon v. Symonds*, 30 Cal. 307. See also *Emeric v. Penniman*, 26 Cal. 124; *O'Connell v. Dougherty*, 32 Cal. 463; *Clark v. Lockwood*, 21 Cal. 221; *Grattan v. Wiggins*, 23 Cal. 37; *Willson v. Castro*, 31 Cal. 439; *Moerenhart v. Barron*, Jan. T. 1872 (not reported); *Schmitt v. Geovanini*, April T. 1872 (not reported.)

<sup>3</sup> See *Minturn v. Brower*, 24 Cal. 640; *Steinbach v. Moore*, 30 Cal. 506; 31 Cal. 131; *Stevenson v. Bennett*, 35 Cal. 432.

The facts are sufficiently stated in the opinion.

*Nathaniel Bennett*, for Plaintiffs and Appellants.

[505] \*The subject matter of dispute in this case is a ranch in the county of Monterey. The main point in the case is, that the defendant holds the legal title in trust for the plaintiffs, who have the equitable title.

The plaintiffs claim under a grant from the Mexican Government. The defendants claim under a pretended grant from the same Government, fortified by a patent from the United States, issued in pursuance of the Act of Congress of March 3d, 1851, for the settlement of land titles in California. The plaintiffs insist that the patent of the defendant inures to their benefit.

The complaint is framed with a double aspect: 1st, under our statute to quiet the title; and 2d, upon the general principles of equity, to declare and enforce a trust. Both points, however, in fact resolve themselves into the same thing; for we do not well see how we can maintain an action to quiet the title without at the same time establishing the trust.

Although the complaint may not, in so many words, pray that the defendant may be declared to hold the land as a trustee for the plaintiffs, it does contain the substance of such prayer, as it asks that the defendant Spence may be decreed to convey the land to the plaintiffs; and besides, the facts set forth in the complaint being sufficient to entitle us to relief asked for, the Court will grant such relief even though not prayed for.

The answer denies all the allegations of the complaint, except that the defendant Spence holds a patent of the United States for the premises, and the execution of the mesne conveyances to Spence from José Mariano Estrada, and sets up numerous substantive defenses, based upon the Statute of Limitations; but as the proof does not sustain them, it is unnecessary to notice them.

We insist that all the material allegations of the complaint are sustained by the proofs; and the only question is, does the law upon them entitle the plaintiffs to the relief demanded?

Judge Story, in his *Equity Jurisprudence* (vol. 2, sec. 1195)

includes among implied trusts, "those which are forced upon the party by operation of law; as, for example, in cases of fraud, imposition, notice of an adverse equity, and other cases of a similar nature."

\*In this case the defendant had all along notice of [506] the adverse equity of the plaintiffs; and therefore the procuring of the patent in his own name and for his own benefit, operates as an imposition on the rights of the plaintiffs. The case is analogous to that, to say the least, where a man buys land with another's money and takes the conveyance in his own name (2 Story's Eq. Juris. 55, sec. 1201;) or in the case where a profferment is made without consideration, in which event the use results to the proffer. (Sec. 1201.)

The position for which we contend has already been passed upon by this Court in *Estrada v. Murphy*, 19 Cal. 249. That case goes the full length of sanctioning the decree for which we ask. It is there held that "if the confirmee in presenting a Mexican claim, acted as agent, or trustee, or guardian, or in any other fiduciary capacity, a Court of Equity, upon a proper proceeding, will compel a transfer of the legal title to the principal *cestui que trust*, ward, or other party equitably entitled to the same, or subject it to the proper trust in the confirmee's hands. It matters not whether the presentation were made by the confirmee in his own name in good faith, or with intent to defraud the actual owner of the claim, a Court of Equity will control the legal title in his hands so-as to protect the just rights of others."

And the case of *Castro v. Hendricks*, 23 How. 441, cited in *Estrada v. Murphy*, fully sustains the doctrine of the latter case; as the necessary result of the case of *Castro v. Hendricks* is, that the fact of obtaining a patent is not conclusive in favor of the patentee, but that others may be shown to have the better right, and that the Government has no interest in the contests between persons claiming *ex post facto* the grant.

We think we might safely rest our case on the two cases last cited; but the precise doctrine for which we contend is laid down in *Boggs v. The Merced Mining Co.*, 14 Cal. 280, in the following words: "The proceeding by bill in equity, which an individual is allowed to take to set aside a patent or control its operations, is in the nature of a bill to quiet title—

to determine an estate held adversely to him—to remove what would otherwise be a cloud on his own title; or is in the nature of a bill to enforce a transfer of the interest from the patentee, on the ground that the latter has, [507] \*by mistake or fraud, acquired a title in his own name, which he should in equity hold for the benefit of the complainant. The individual complainant must therefore possess a title superior to that of his adversary, and of course, to that of the Government through whom his adversary claims, or he must possess equities which will control the title in his adversary's name."

Apply the doctrine of that case to our own. Our proceeding is by bill in equity. It is to impose a transfer of the interest of the patentee. He has acquired a title in his own name, which he should in equity hold for the plaintiffs. The plaintiffs possess a title, which prior to the patent to the defendant, was, in equity at least, superior to that of the defendant, and to that of the Government through which the defendant claims. And the plaintiffs, therefore, possess equities which ought to control the title in the defendant's name.

Nor should it be supposed that our case cannot be maintained because the Court below found that the defendant was not guilty of fraud. (This was not the finding of the Court as claimed by counsel, but merely the opinion of the Court below, as this Court will see by an examination of the opinion or finding.)

This is an equity case, and this Court is not bound by the finding of the Court below on questions of fact; but it is unnecessary for us to establish actual fraud. What the law denominates constructive fraud is all we need to maintain our case. This is illustrated in almost every possible shape in the chapter on "Constructive Fraud," in Story's Equity Jurisprudence (vol. 1, pp. 268-440.) Thus, if José Mariano Estrada under whom the defendant pretends to claim, had notice of the Mexican title of his son José Santiago Estrada, under whom the plaintiffs claim, that would amount to constructive fraud. In such case, a Court of Equity "will hold the purchaser a trustee for the benefit of the person whose rights he has thus sought to defraud. (1 Story's Eq. Juris. secs.

395, 396, 399.) Not a shadow of doubt can exist but that the defendant had full knowledge of the claim or title of Santiago.

That the decree which we ask for is the proper relief, is sustained by the case of *Brown v. Lynch*, 1 Paige's Ch. 147, where it is held that a Court of Chancery will relieve, in a case of this nature, \*by converting the person [508] guilty into a trustee for the injured party. In that case the Vice-Chancellor says, (p. 152,) quoting the language of Lord Eldon, "It has long been settled, that if a conveyance has been obtained by means which in this Court have the character of imposition, fraud, oppression, or undue advantage, the person deriving a title under it is a trustee, and the species of relief is by directing a reconveyance." And the Chancellor says in the same case, (p. 158,) "The means to be employed is to convert the person who has gained an advantage by means of his fraudulent act, into a trustee for those who have been injured thereby."

The unavoidable inference to be drawn from the case of *West v. Cochrane*, 17 How. 403, is in favor of our position. The action was ejectment upon a state of facts in many respects analogous to the facts in our case. The action failed because the plaintiff had not the legal title; Mr. Justice McLean remarking at the conclusion of the case (p. 416): "In this case I do not dissent, as it is the understanding of the Judges that the equity of the case remains open for further investigation."

The following authorities illustrate in a greater or less degree the position for which we contend: *Moore v. Wilkinson*, 13 Cal. 478; *Willot v. Sanford*, 19 How. 82; *Garland v. Winn*, 20 Id. 8; *Jones v. McMaster*, Id. 22; *Mezes v. Green*, 24 Id. 268.

*D. R. Ashley*, for Respondent.

I. Plaintiffs not being in possession of any part of the land, could not sustain the action. (Prac. Act, sec. 254; *Ritchie v. Dorland*, 6 Cal. 40; *Smith v. Smith*, 12 Id. 216; 17 Ill. 135; *Curtis v. Sutter*, 15 Cal. 262; *Bayerque v. Cohen et als.*, 1 McAl. 117; *Armitage v. Wickliffe*, 12 B. Munroe, 488;

*Surgett v. Lappice*, 8 How. U. S., 165; *Loring v. Downer*, 1 McAL. 365; *Head v. Fordyce*, 17 Cal. 151.)

II. There being no fraud shown on the part of the defendant, he could not be required to convey the land to plaintiffs unless his relation towards them in acquiring his title made him their *quasi* trustee. But the defendant is an utter stranger to the title set up by plaintiffs, and claims [509] nothing under it; nor has he borne any \*fiduciary relation to plaintiffs or their grantor. His acquisition of title to the lands by patent will not inure to benefit of plaintiffs. Besides, defendant's grantor Dias, acquired defendant's title with the knowledge and consent, and under the direction of José Santiago Estrada, the grantor of plaintiffs, who are not purchasers in good faith.

III. The Court did not err in refusing a new trial. The testimony was overwhelmingly in favor of the defendant, and entirely justified the findings and judgment of the Court, and would not support any other.

1. The plaintiffs were not in possession of the land nor any part of it.

2. The defendant is in possession of the land, and so has been exclusively for ten years; his immediate grantor, Manuel Dias, was in possession from 1845 to 1850; and the immediate grantor of said Dias, to wit, José Mariano Estrada was in possession from 1823 to 1845.

3. The land in dispute is named Rancho "Llano de Buena Vista," and is situated on the north or right-hand side, going down of the Salinas or Monterey River. The rancho named Buena Vista is opposite on the south or Monterey side of said river. The alleged title of plaintiffs is for "Buena Vista," and they have no title to the land in dispute. The defendant has title to the land in dispute, "Llano de Buena Vista."

IV. The apparently good but really defective title, not the genuine and true one, is a cloud upon the title; and if the holder of the true title is not in possession, he has a plain, speedy, and adequate remedy at law by ejectment; and he cannot proceed in equity. But if he is in possession, as this Court has before said, he might formerly, without the aid of statute, after his title had been tested and affirmed at law, have proceeded to remove the cloud; yet now under the

statute, he may, being in possession, proceed in equity without a previous trial at law. But in this latter case the plaintiff must show a clear legal title in himself. (33 Miss., 4 George, 292.)

There may possibly be a case where one, out of the possession and not having the legal title, may in equity procure the conveyance of that title in himself, where [510] the holder of the title has by trick and fraud acquired it. But this is not plaintiffs' case. They allege title in fee in themselves, entirely independent of, distinct from, and adverse to the defendant's title; and they allege no relation of trust or fiduciary character in the defendant.

FIELD, C. J. delivered the opinion of the Court—COPE, J. and NORTON, J. concurring.

The Court below appears to have treated this action as brought under the statute to quiet the title of the plaintiffs to a tract of land situated in Monterey county, and to have ordered its dismissal on the ground that the plaintiffs were not in possession of the premises at its commencement. Such possession of the plaintiffs was essential to maintain an action of this character. (Prac. Act, sec. 254.) But the defendants contend that the action was brought not merely to quiet the title of the plaintiffs, but also to establish and enforce a trust. The complaint sets forth that a grant of the premises was issued in 1822 to José *Santiago* Estrada, through whom the plaintiffs trace their title; that the defendant David Spence presented a claim for the same premises to the Board of Land Commissioners, alleging that a grant of them was made in 1823 to José *Mariano* Estrada, through whom he de-rails his title; that the claim was confirmed; that subsequently a patent for the land was issued to him by the United States; that the confirmation was obtained by fraud and false representations; and that the mesne conveyances to him and the patent constitute a cloud upon the plaintiffs' title; and concludes with a prayer that the mesne conveyances be set aside, that he be enjoined from making any claim to the premises, and be decreed to convey the same to the plaintiffs, and for general relief.

The answer of the defendant Spence denies all the allega-

tions of the complaint which affect his rights to the premises in controversy, and sets up several special defenses which it is not material to notice.

The evidence shows that the grant to José *Santiago Estrada* embraces different premises from those claimed by the plaintiffs; that the premises which it cedes were called "Buena Vista," and are situated on the south side of Salinas or Monterey River; and that the premises granted to [511] José *Mariano Estrada* were called "Llano Buena Vista," and are situated on the north side of the same river. This fact that the parties claim under independent grants, covering different premises, of itself disposes of the case.

But if the fact were otherwise, and the two grants covered the same premises, the case presented would only be one of conflicting grants. Neither can be made the basis for impeaching a patent for the same premises until its validity has been determined by the tribunals of the United States, under the Act of Congress of March 3d, 1851. And as the validity of the claim of the defendant Spence under the grant to José *Mariano Estrada* has been recognized and confirmed, and a patent issued to him, the claimants under the opposing unconfirmed grant, even if it embrace the same premises, relying solely upon such grant, cannot call in question his rights either in law or equity. It does not appear from the record whether those claimants have ever presented their claim for confirmation. If they have not done so their claim is to be treated as non-existent, and the land, so far as they are concerned, as part of the public domain. (*Estrada v. Murphy*, 19 Cal. 269.)

Independent of these views, there is another consideration which concludes the case. The plaintiffs do not show the possession of any equities which can control the legal title. They present no evidence of the existence of any such relation of trust or confidence between them and the patentee as imposed upon the latter the duty of acting for their benefit, and of holding the title for their use. There was no fiduciary relation between them. Nor does it appear that there was any mistake committed by the authorities at Washington in issuing the patent to the defendant Spence. The instrument



was intended for the party who received it. Nor is it pretended that any fraud was committed by the patentee in the deraignment of his title from the original claimant of the premises. The genuineness and due execution of the intermediate conveyances from José Mariano Estrada to him are not questioned. Nor can it be said that he acquired his title with notice of any equitable rights of the plaintiffs which could affect him. The parties claimed under independent grants, and no equities could arise in favor of the plaintiffs against him from his knowledge of their separate claim.

Judgment affirmed.

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\*TEVIS v. O'CONNELL.

[512]

<sup>1</sup> JUSTIFICATION WHEN VOID.—A justification by the sureties upon an undertaking on appeal to the Supreme Court made before a County Judge of a county other than that where the judgment was rendered, is not effectual for any purpose. *Roush v. Van Hagen*, 18 Cal. 668, affirmed on this point.

REINSTATEMENT OF APPEAL.—Where a motion to reinstate an appeal was opposed on the ground that the undertaking on appeal was invalid, and after argument and submission, was denied on this ground: *Held*, that it was then too late for appellant to offer to file a new undertaking. The offer should have been made before the motion was submitted.

APPEAL from the Fourth Judicial District, County of San Francisco.

On motion of respondent, based on a certificate of the Clerk of the District Court, the appeal was, on the fourth of March, 1863, dismissed. Subsequently, during the same term, appellant moved on affidavit to reinstate the appeal, and in opposition to the motion, respondent showed by the certificate of the Clerk of the District Court that the sureties upon the appeal bond had been excepted to and had justified, not in San Francisco County, but before the County Judge of Contra Costa County, at Martinez.

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<sup>1</sup> Referred to in *Calderwood v. Tevis*, 23 Cal. 336.

*A. Williams*, for Appellant.

*H. O. Beatty*, for Respondent, cited *Roush v. Van Hagen*, 18 Cal. 668.

COPE, J. delivered the opinion of the Court—FIELD, C. J. concurring.

The defendant moves to reinstate the appeal in this case, which was dismissed for failure to prosecute. The plaintiff shows, in opposition to the motion, that in fact no appeal has been taken, as the sureties upon the undertaking were accepted to, and justified before a County Judge of a county different from that in which the judgment was rendered. This we regard as a valid answer to the motion; the case of *Roush v. Van Hagen*, 18 Cal. 668, settles the construction of the statute.

[513] \*The motion is denied.

Subsequently, appellant petitioned for a rehearing, and offered to execute a new undertaking, and the following opinion was delivered by COPE, J.—FIELD, C. J. concurring:

The petition for a rehearing must be denied. The offer to execute a new undertaking comes too late. It should have been made before the motion to reinstate was disposed of. The defendant chose, for the purposes of the motion, to rely upon the old undertaking, and he must abide the result.

Petition denied.

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## BERREYESA v. SCHULTZ—SCHULTZ v. BEASLY.

**MEXICAN GRANT, TITLE AND BENEFICIAL INTEREST IN.**—José and Sisto Berreyesa, in 1843, petitioned the Governor of California for a grant of eight leagues of land, known as "Las Putas," and in their petition represented that they were married, and had children, and also a considerable number of cattle and horses, and needed land on which to place them. On this petition, after a favorable report from his Secretary, the Governor ordered that a title issue to the petitioners for so much of the land as they could settle. No title issued upon this order; but for some unexplained reason the petitioners considered the concession which it directed as embracing four leagues of the tract solicited, and on the following day they presented a second petition, in which they stated that their families were very large,

and included their parents, children, and brothers, and besides that there were more than one hundred uncivilized Indians in their neighborhood whom it was necessary to maintain, and for these reasons prayed a grant to themselves of the other four leagues. The report of the Secretary on this petition speaks of it as presented for the benefit of the petitioners, and of their parents, children, and brothers. On this petition a grant was issued, conceding to José and Sisto the entire tract, and declaring it to be their property, and imposing upon them the usual conditions. This grant recited that the grantees had petitioned "for their personal benefit, and that of their families, and that of their parents and brothers." It being contended by the appellants, from these facts, that the parents and brothers of the petitioners as well as petitioners were beneficially interested in the grant: *Held,*

*First*—That no valid argument in favor of the position of appellants could be drawn from the character of the first order of the Governor, because the grant which transferred the title was not issued upon it;

*Second*—That the second petition, and the report of the Secretary upon it, taken together, showed that the parents, children, and brothers, were referred to \*only as inducements for enlarging the bounty of the Government to the [514] petitioners, and not as distinct additional beneficiaries;

*Third*—That the recital in the grant did not control the course of the title—that it only disclosed the inducements which operated upon the Governor to make the grant, and that the language of the operative clauses entirely excluded the idea that any other person than the two Berreyesas who petitioned were to become invested with the title;

*Fourth*—That José and Sisto Berreyesa, the grantees, were invested by the grant with the full legal and beneficial title to the land, exempt from any trust in favor of the other members of the family.

**PETITION FOR COLONIZATION GRANT.**—The Mexican Regulations of 1828 required the applicant for lands, whether an *empresario*, head of family, or private person, to set forth in his petition to the Governor, "his name, country, profession, the number, description, religion, and other circumstances, of the families or persons with whom he wished to colonize," and though these particulars constituted considerations with the authorities in whom the granting power was vested, they did not in any respect control the course of the title against the operative words of transfer in the grant.

### APPEAL from the Seventh Judicial District.

On the eleventh of February, 1842, José de Jesus Berreyesa and Sisto Berreyesa presented the following petition to the Military Comandante of Sonoma.

*"To the Señor Military Comandante of Sonoma:*

"José de Jesus Berreyesa and Sisto Berreyesa, married, with children, and residents on this frontier, in due form represent: that owning a considerable number of cattle and horses, and not having a tract of land on which to place them, suitable for their increase, they both together, equally, solicit the place known by the name of Las Putas, of the extent of eight square leagues.

"The place referred to is vacant, and does not belong to any individual; on the contrary, it lies in the neighborhood of the uncivilized Indians, and it is even the object of the subscribers to contribute to the civilization of the tribes in the neighborhood of said place.

'Wherefore, they pray your Honor to be pleased to give them permission to occupy the said land provisionally—meanwhile the necessary proceedings are being had to obtain the legal title from the proper authority—in which they [515] will receive grace and favor, \*admitting this on common paper, not having any of the corresponding stamp.

"JOSE DE JESUS BERREYESA, †

"SISTO BERREYESA. †

"SONOMA, February 11th, 1842."

On the same day—February 11th, 1842—the following order was made by the Military Comandante on the petition:

"SONOMA, February 11th, 1842.

"The parties to this petition may occupy the land asked for, and they shall present themselves to the Government for the proprietary titles.

"SALVADOR VALLEJO."

On the sixteenth of July, 1843, the same persons presented to the Governor the following petition:

"*Most Excellent Señor:*

"José de Jesus Berreyesa and Sisto Berreyesa, residents of Sonoma, and established in said point, before your Excellency, with the proper respect, and in due form of law, represent: That being both married, with families, and having a considerable number of cattle and horses, and needing a place or tract of land suitable for the security and preservation of their small property, they presented themselves before the Señor Comandante of this point, asking him to grant them permission to place their said property on the land known by the name of Las Putas—meanwhile the necessary proceedings were being had to obtain legal title—and having obtained said permission, as is shown by the accompanying

document, we solicit your Excellency to be pleased to grant us the land indicated, which land is of the extent of eight square leagues, to which end a diseño of the land petitioned is herewith presented to your Excellency, hoping to receive from the goodness of your Excellency the necessary assistance for our numerous families, for the security of their interests, their subsistence, and well being.

"Wherefore, they earnestly pray your Excellency to be pleased \*to accede to their petition, which favor [516] they hope to receive, swearing that they do not act in bad faith, and whatever is necessary.

"JOSE DE JESUS BERREYESA, †

"SISTO BERREYESA. †

"SONOMA, July 16th, 1843.

"The foregoing is not written upon sealed paper, there being none in this place."

Upon this petition the Governor made an order, dated October 26th, 1843, directing the Secretary to report, and thereupon the Secretary made the following report:

"In consideration of the good character of the petitioners, from all the information I can receive, as well as on account of the time they have occupied the land for which they petition, and having built a house upon the same, and commenced other labors for the improvements thereof, all of which renders them worthy that your Excellency should accede to their petition, if the same should meet the approbation of your Excellency.

"This is all I can report in relation to the matter, in compliance with the superior decree of your Excellency of the date of to-day.

"MANUEL JIMENO."

On the twenty-seventh of October, 1843, the Governor made the following order:

"Let the title issue for so much as they can settle, they not being permitted to sell or alienate the same, etc., marking out the boundaries."

On this order no title appears to have been issued. For some reason or other, which is unexplained, the petitioners seem to have conceived the idea that under this order they

could only obtain a title to four leagues of land; and not being satisfied with a grant of that extent, on the next day, the twenty-eighth of October, 1843, they addressed to the Governor the following petition:

*“ Most Excellent Señor:*

“ José de Jesus Berreyesa and Sisto Berreyesa, residents of the frontier of Sonoma, and established on the rancho [517] known by the \*name of Las Putas, before the high justification of your Excellency, and in due form of law, present themselves, and say: That our family being so large, including also our parents, brothers, and our children, and counting also more than one hundred uncivilized Indians that surround us, and desiring to live all upon the same place, which we solicit, and the four sitios [four square leagues] which your Excellency has been pleased to concede us not being sufficient to contain us, since we need lands for our flocks and herds, and lands for cultivation, for, besides the subsistence of all our family, it is necessary to maintain the Indians, in order to avoid to some extent the robberies they are likely to commit. Wherefore, we pray your Excellency to be pleased to concede us the other four square leagues, hoping that your Excellency will coöperate for our well being, we earnestly pray that you may be pleased to accede to our petition, in which we will receive grace and favor swearing that we ask in good faith.

“ JOSE DE JESUS BERREYESA,

“ SISTO BERREYESA.

“ MONTEREY, October 28th, 1843.”

On the thirtieth of October, 1843, the Governor ordered the Secretary to report, which he did, on the same day, in these words:

*“ To the Señor Governor:*

“ The land petitioned for anew by the Señors Berreyesa for their own benefit, and that of their parents, children, and brothers, I understand can be conceded to them without any inconvenience, since, in consideration of the numbers composing all the families, and as the land cannot be divided, it

being a cañada surrounded by hills, it may well be conceded in order that the persons referred to may occupy it in colonization, without being permitted to sell or alienate the same, and subject to the other customary conditions; but the determination of your Excellency in the matter will be most proper.

“MANUEL JIMENO.

“MONTEREY, October 30th, 1843.’

On the thirty-first of October, 1843, the Governor made an \*order that, in accordance with the report of [518] the Secretary, the title should issue with the conditions expressed; and on the third of November, 1843, a decree of concession was made as follows:

“MONTEREY, November 3d, 1843.

“In view of the petition with which this *expediente* commences, the foregoing reports, with all other matters necessary to be considered, in conformity with the laws and regulations on the subject, I declare the citizens José de Jesus and Sisto Berreyesa owners of the place named Las Putas, bounding with the hills (*lomeria*) surrounding the same Suyacaleur, Buli, and Queneltal, of the extent of eight square leagues.

“MANUEL MICHELTORENA.”

And thereupon, on the same day, on the third of November, 1843, the following grant was issued:

“Manuel Micheltorena, Brigadier-General of the Mexican Army, Adjutant-General of the Staff of the same, Governor, Comandante-General and Inspector of the Department of the Californias:

“Whereas, the citizens José de Jesus and Sisto Berreyesa have petitioned for their personal benefit, and that of their families, that of their parents and brothers, the land known by the name of Las Putas, bounded by the range of hills, (*lomeria*,) which surrounds the same, named Suyacaleur, Buli, and Queneltal, the necessary proceedings having been previously had, and the investigations made as required by the laws and regulations, in exercise of the authority conferred upon me, in the name of the Mexican nation, I have determined to concede to them the said land, declaring the same

to be their property by these presents, subject to the approval of the Most Excellent Departmental Assembly, and under the following conditions:

"1st. They shall not sell or alienate the same, impose upon it ground rents, bond, or mortgage, or any other incumbrances, whatever.

"2d. They may inclose it without prejudice to the roads, crossings, and servitudes; they shall enjoy it freely and exclusively, devoting it to the use or cultivation which [519] may be most convenient; \*but within one year they shall build upon it a house, which shall be inhabited.

"3d. They shall solicit the respective Judges to give them judicial possession, by virtue of this dispatch, by whom the boundaries shall be marked out, on the limits of which will be placed, besides the landmarks, some fruit trees, or forest trees, of some utility.

"4th. The land, of which donation is made, is of the extent of eight square leagues, a little more or less, as by the respective diseño. The Judge who may give the possession will cause the same to be measured in accordance with the ordinance, the surplus that may result to remain to the use of the nation.

"5th. If they violate the conditions, they shall lose their right to the land, and it will be denounceable by another.

"In consequence whereof, I order that this, [document] serving them as a title, be held as firm and valid, and that registry be made of it, and that it be delivered to the interested parties for their security and further ends.

"Given in Monterey on the third of November, one thousand eight hundred and forty-three.

"MANUEL MICHELTORENA.

"MANUEL JIMENO, Secretary."

The first case, in which Berreyesa is plaintiff, is a bill in equity. The complaint sets forth that Nasario Berreyesa and Maria Antonia, his wife, having a large family of eleven sons (one of whom was the plaintiff) and three daughters, in the year 1839 settled on a rancho situated in the present county of Napa, and known as Las Putas, and which is particularly described in the complaint; that this land was possessed and



occupied by the different members of the said family, with their herds, in common; that in October, 1843, whilst said occupation continued, Jesus and Sisto Berreyesa, two of the sons, petitioned the Governor for a grant of said rancho (which contained eight leagues of land) for the benefit of themselves, their parents, and their brothers and sisters; that in November, 1843, a grant of said rancho was made to said Jesus and Sisto Berreyesa, for the benefit of themselves, and also for the benefit of their father and mother, and brothers and sisters; that \*after the said [520] grant the family continued to occupy and possess the said rancho with their flocks and herds; that they claimed it in common, and improved it in common, and that Sisto and Jesus Berreyesa always recognized the interest in common of the other members of the family; that afterwards, and at different dates, sundry members of the family died intestate and without issue, leaving thereby their interest in said rancho in the survivors; that Jesus and Sisto Berreyesa, the two brothers who petitioned for the grant, assigned their interest to their wives, Maria Antonia, and Maria Nicolasa Higuera, who, along with their husbands, presented the claim to the Land Commission, who confirmed it; that said Jesus and Sisto Berreyesa, and their said wives, conveyed to Thorn and Treat, with full notice of the premises, and whilst the plaintiff was in possession in common with the other members of the family as aforesaid; that the defendant, by virtue of mesne conveyances, and with like notice, acquired the title of Thorn and Treat; that in virtue of his title so acquired he pretended and claimed to own the entire rancho—was endeavoring to obtain a patent for the land from the United States to himself exclusively, and threatened to bring a suit to dispossess the plaintiff from the land. The complaint also contained copies of all the documents set forth or referred to in the above statement of facts, and prayed the Court to decree that the defendant held as a trustee for the use of the plaintiff to the extent of his interest; that the defendant should execute to the plaintiff a deed for said interest, and that in the meantime he should be restrained by injunction from causing a patent to be issued.

To this complaint the defendant demurred, and the Court

having given judgment on the demurrer for the defendant the plaintiff appealed.

The suit of *Shultz v. Beasly* is an action of ejectment for the same rancho. Beasly defends by setting up: first, the same case set forth in his complaint by Miguel Berreyesa; and second, the further fact that in 1845 he intermarried with Clara Berreyesa, a member of the said Berreyesa family; that after his said marriage he entered on said rancho with his wife, the said Clara, and from then till now (and living with [521] her and their children) had been \*upon said rancho in virtue of his said wife's interest therein in common with the other members of the said family of Berreyesa. The prayer of the answer was for the same relief as was asked for in the complaint of Miguel Berreyesa. The plaintiff Schultz demurred to the answer of Beasly, and the Court having given judgment on the demurrer for the plaintiff, the defendant appealed.

*Hepburn & Dwinelle, and Baldwin & Haggin, for Appellants.*

That the grant made on the third of November, 1843, was founded entirely on the second petition and not on the first, is shown by the fact that it recites in the first sentence that it was made on the petition of Jesus and Sisto Berreyesa, who had petitioned for the land for their personal benefit, that of their families, and "that of their parents and brothers and sisters;" the parents, brothers, and sisters not being mentioned in the first petition.

Here, then, we have a petition for eight leagues of land by two persons, who ask for it for themselves. The eight leagues are refused, but as much of the eight leagues as they can stock is offered. This offer, instead of being accepted and prosecuted to a grant, is declined, and a new petition is presented asking for the same lands, not for themselves, but for themselves and others, who together could stock and occupy it. The report called for on this petition, recommends the grant specifically and carefully on the grounds set forth in the second petition: "In consideration of the number composing all the family, who might occupy it in colonization." The grant follows, and shows on its face that it was made for the reasons given in the report; that is to say, because Jesus

and Sisto Berreyesa had petitioned for the eight leagues "for their personal benefit, that of their families and that of their parents and brothers and sisters." They could not stock and occupy the eight leagues themselves, and it was refused to them; they could stock and occupy it, aided by their parents and brothers and sisters, and it was granted "in colonization."

In the judgment of the Supreme Court of the United States, 18 Howard, 548, colonization means immigration or settlement "in numbers;" and the Mexican Regulations of 1828 declare that the lands shall be granted to "contractors, (*empresarios*,) families, or \*private persons, for [522] the purpose of cultivating and inhabiting them." (See Articles 1, 2, 5, 16, Rockwell, 453, 454.)

"Families" are as much objects of the bounty of the Government as "private persons." Lands are to be given to both for the same reason, "cultivating and inhabiting them." In this case the private persons not being able to cultivate and inhabit the whole of the tract asked for, it was refused; but to the families who were able to occupy and cultivate it, it was granted. Shall the fact that this grant was asked for by two in the name of all, restrict the title to two, and defeat the title to all? This would not only be against natural equity, but contrary to the colonization law itself, which, in order "to combine the possessions of families," gave a preference for grants of public lands adjoining proprietors, to the children and relatives of the proprietors. (See Rockwell, 454, sec. 16 Regulations of 1828.)

It is familiar that under the Mexican system, the Alcalde, in a summary way, dispossessed intruders upon lands which had been granted. Could Jesus and Sisto Berreyesa, after their parents and brothers and sisters went into possession under this grant, and made improvements, have invoked the aid of the Alcalde to turn them out? The title being granted equally for the benefit of all the family, can it be doubted that the other members of the family could invoke the title to show that they had as good right to the possession and enjoyment of the land as Jesus and Sisto? Occupancy and cultivation being the source of title of all, and being paid by all, should be shared by all. Suppose Jesus and Sisto had pro-

secuted their first petition to a grant; had obtained a grant for as much land as they could stock, and under this grant had taken possession of a league and occupied it. The seven leagues would then have been public land, and the parents and brothers and sisters could have asked for it, and, under the colonization law, have had a preference for it. This is precisely what they have done, only in a different way.

Again: by the eleventh article of the Regulations of 1828, lands granted are liable to be denounced and regranted to others for nonperformance of the conditions of settlement.

Suppose Jesus and Sisto Berreyesa had abandoned [523] their possession and occupancy of \*this rancho, but the rest of the family had remained, would the land have been subject to denouncement? If it would, then the parents and brothers and sisters would lose the possession and occupancy of lands the right and title to which was dependent on possession and occupancy. But the case at bar is even stronger than this; for Schultz, who claims the whole rancho, stands here as the assignee of Jesus and Sisto Berreyesa; and that they have abandoned their possession is proved by the fact that their assignee is suing for it. So that if the Court give judgment for Schultz, they will determine, in effect, that Jesus and Sisto Berreyesa, who have not performed the conditions of the grant, shall turn out their co-tenants who have performed them. Mr. Justice McLean has said in the famous Bastrop case, that "the remuneration given for colonization in the Spanish colonies was uniformly a grant of lands." (11 Howard, 660.) Here the land has been granted by the Government "in colonization," (those very words being used, *ex industria*, in the title papers,) yet the proposition made to the successor of that very Government is, to confirm the grant as a colonization grant, but to take away the land from the colonist.

When the Government denounces a rancho, it is always on the petition of some colonist, who sets forth that the land, though granted before, has been abandoned; is vacant and unoccupied, and that he, the petitioner, will occupy and improve it if granted to him. The motive, then, of the Government in making a denouncement is the same as in making a grant, to wit: occupation and improvement. How

absurd then to say that the Government would denounce or regrant (for regranting and denouncement are the same thing) a rancho for the purpose of occupation and improvement, which rancho was already granted, occupied, and improved. The power to denounce is derived from the same source as the power to grant, to wit: the law of 1824; and according to this law the power to denounce is not absolute but conditional, and dependent on the fact of abandonment; so that where there is no abandonment there can be no denouncement. From this it results that this land having been continuously occupied by this family, the Mexican Government could not have deprived them of it, even if it had been so disposed; and would therefore have been bound \*to [524] extend the "definitive title," if it had been asked for.

Suppose, then, that this definitive title had been asked for by Jesus and Sisto Berreyesa for themselves, and by the family for all, to which of the two would the Government have given it? The utmost that Jesus and Sisto could say in their favor would be, that they had settled and occupied; but this they offered to do in their first petition for a grant; and which was refused to them for the reason that their occupation alone was insufficient. On the other hand, the family could say that this land having been refused to two because the occupation of two was insufficient, was given to all, on the condition that all would occupy; that all had occupied, and therefore, the Government, having received the consideration from all, should extend the title to all.

To say nothing of honesty, policy would require the Mexican Government to reason in this way; for if they gave the title to Jesus and Sisto, to the exclusion of the other members of the family, then Jesus and Sisto could turn the others off; and thus the Government would find itself in the ridiculous position, first: of granting to two colonists the identical rancho, which because there were only two, it had refused to grant them; second, of being false to meritorious colonists who had been true to it; and third, of thwarting by its own acts the great motive and policy of the whole system of grants, to wit: colonization. The importance of this view of the case will be seen, when it is recollected that one of the modes of colonization provided for by the law of 1824, was by *em-*

*presario*. This grant, instead of being a grant of eight leagues to a family, might just as easily have been a grant of a hundred leagues to an *empresario* upon the condition of settling thereon a hundred colonists. If in such a case the Government should prefer the *empresario* to the colonists, and issue the definitive title, not to them, but to him, the *empresario*, becoming thus the owner of the land, could immediately turn round and expropriate the colonists, and thereby entirely defeat the object and policy of the Government in making the grant.

The Bastrop case, already cited, shows that this cannot be done. In that case the definitive title was given to the colonists, and not to Bastrop; and to each in proportion [525] to his settlement. This was \*done at first by the Spanish Provisional Government; and the United States, when they succeeded to the Spanish Government, pursued the same course. (11 Howard, 648, 651, 652.)

Wherefore should the Berreyesa colonists, who have always been, and still are, in possession, be denied the justice which was accorded to the Bastrop colonists? This action of ejectment by Schultz, is in legal effect a suit by Jesus and Sisto, to oust their co-tenants and co-colonists; and as the Mexican Government would not entertain it, so neither should ours, which has succeeded to its obligations as well as its rights.

The unimportance of the person to whom a grant issues, is strongly shown in the case of the Arguello claim to the Rancho Las Pulgas. In that case, José Estrada representing himself as the Executor of Don Louis Arguello deceased, on the twenty-seventh of October, 1835, petitioned the Governor for a grant of the Rancho Las Pulgas to the minor children of said Louis Arguello, to wit: José Ramon and Luis, Maria Concepcion and Maria Josefa, on the ground that the father had been the owner of the land since 1800, and that the titles had been mislaid. On this petition, after taking testimony to show that the minors were Mexicans and had sufficient stock to settle the rancho, the Governor, in November, 1835, made a grant, in which after reciting that Estrada had petitioned for the benefit of the minors, he declares and vests the title thus: "Using the faculties which are conferred on me, by decree of this day, I have come to declare him the owner

thereof by the present letters." \* \* \* "In consequence I order that the present, serving as a title to him, be held firm and valid, be recorded in the book thereto corresponding, and be delivered to the petitioner for his security and other purposes."

This is as plain a grant to Estrada as can be made, but as he asked for it for others, and as the others for whom he asked it, went into possession of it, and lived on it, the Court had no difficulty in confirming the claim to them and not to him. (See the grant in this case, *United States v. Arguello*, 18 How. 542.)

As a question of authority, the case is also plain. The doctrine of the English law is, that "any expression manifesting an intention that the donee of property is not to have the beneficial \*enjoyment of the whole or [526] some part of it, will be binding on the conscience of the trustee, and will, in equity, exclude any claim by him to the beneficial interest." (10 Ves. 537.) For this purpose, it is by no means necessary that the donee should be expressly directed to hold the property to certain "uses," or "in trust," though such words being definite and technical would be properly employed. That there is no magic in the words is a rule of equitable construction. Any expressions which show a clear intent to create a trust will have the effect. (1 Myl. & Craig, 401.) Thus, where a gift in a will is expressed to be "for the benefit" of others, or to be at the disposal of the donee "for herself and children," etc., it is a sufficient declaration of the trust. (Hill on Trustees, 65, 66.)

It is a well settled rule of the English law, that it is not necessary for the *cestuis* to be expressly named, or that the trusts should be expressly declared in the same instrument by which the estate is granted. "All persons who are capable of taking an interest in property at law, may to the extent of their legal capacity, and no further, become entitled to the trust of such property in equity. The beneficial interest in property may also become, and frequently is, vested in objects as *cestuis que trust*, whose existence is not recognized at law." (Hill on Trustees, 51, 52.) "It is not necessary to the creation of a trust, that a *cestui que trust* should be named, or in being at the time." (Hill on Trustees, note I.) So in regard

to the legal capacity to convey in trust, "It may be broadly stated, that every person who is capable of making a valid conveyance of property of any description, has also the power of attaching such limitations or declarations to the act of disposition, as will convert the person taking the legal estate into a trustee for the parties to whom the beneficial interest is given." (Id. 45.) Nor is it necessary that the declaration of the trust should be contained in the same instrument, which vests the legal estate in the trustee." (1 Cox, 1; 2 Myl. & Craig, 684.)

It is not indispensable that the declaration should be made by a formal deed or will. "A simple letter or memorandum, or any writing of a similar untechnical and informal character, will be sufficient, if it clearly express the gift to lie in trust, and sufficiently connect the trustee with the subject matter of the trust." (Hill on Trustees, 64.)

[527] \*Such a declaration of the trust is sufficient under the Statute of Frauds even. Prior to the Statute of Frauds (29 Charles II.) uses might have been declared by parol; at least in all cases of feoffment by livery. (4 Cruise's Dig. ch. 12, p. 149.) And even in case of a transfer of the freehold by fine or recovery (which was an assurance by matter of record;) though a trust, when intended, must have been declared in writing, yet it was not necessary that it should be so expressed at the time. Whenever a fine is levied and a declaration of the uses of it is afterwards executed, the fine and declaration of uses will be considered as one assurance. (5 Cruise's Dig. 216; *Doe v. Whitehead*, 1 Doug. 45.)

In this case, however, there can be no mistake as to the character of the grant. The trust is stamped upon the face of the title papers.

*W. C. Wallace and A. P. Crittenden*, for Respondent.

There is nothing in the last petition which intimates an intention on the part of the applicants to ask for the land in the name of any one but themselves, or to ask a grant in any such form as would give an interest in the land to any other person. Its representations are made to meet a supposed objection in the mind of the Governor that the parties were



asking for more land than, under the Regulations of November 21st, 1828, they would be entitled to receive, in view of the number of their families, and their circumstances. And they meet that objection by the showing of the petitioners that their families included not only their wives and children, but their parents and brothers, and numerous Indians, all of whom the petitioners had to support. These circumstances are required by the second article of the regulations to be stated, and they are precisely those which it was intended should influence the Governor in determining upon the quantity of land to be granted.

The report of the Secretary speaks of this petition as one for the benefit of the applicants, their parents, children, and brothers. And such it undoubtedly was—for all those who constituted a portion of the families of the applicants would derive a benefit from the grant, because it would give to the applicants the means of supporting all those who were dependent upon them. And it is \*in this sense, [528] and no other, that the grant itself speaks of the petition of José de Jesus and Sisto Berreyesa, as one for their personal benefit, that of their families, and that of their parents and brothers. The idea of the appellants that, because of this recital in the report and the grant, all those referred to as persons to be benefited must have a direct interest in the land, and occupy the position of grantees, is untenable, either upon reason or authority. (*Scott v. Ward*, 13 Cal. 474; *Frique v. Hopkins*, 4 Mart. N. S. 214.)

Neither in the petition, nor the report, nor the grant, is there any distinction made between the families and children of the grantees, and the parents and brothers of the grantees. The same phrase embraces them all. In the petition the grantees say that their own families are large because they include them all, and in the report and grant it is recited that the petition for the land is for the benefit of them all. How can any distinction be made between them? Can the parents or brothers have any different, or higher, or better right than the children? Yet this Court has decided that the children have none.

The appellants' argument necessarily runs into an absurdity, and no case can more clearly illustrate it than the present.

The uncivilized Indians, more than one hundred of them, are also represented in the petition to be part of the family of the petitioners, and are equally with the parents and brothers to be benefited by the grant. And upon the principle contended for by the appellants each one of them could claim to be an owner of the land.

There is no more ground for contending that this grant was not made exclusively to José de Jesus and Sisto Berreyesa than there would be if the "moving cause," instead of being the unusually large number of persons composing the family of the petitioners, as shown by their second petition, had been a very great increase of their stock between the date of the two petitions. The quantity of land to be granted is to be proportioned both according to the number of persons to be indirectly benefited and the circumstances of the grantees—that is, the nature, kind, and amount of property they have. Upon both these elements depends the extent of the land which the grantees can use, and which therefore should be granted to them. It is so declared in article second of the regulations.

[529] \*The error of the appellants' argument results from confounding the form, nature, and character of the grant with its "moving cause"—the inducements on which it was made. In the case of *Scott v. Ward*, 13 Cal. 477, it was urged, as here, that the recital in the grant—that the grantee solicited the land "for his personal benefit and that of his family"—ought to control the operative words of the grant. The Court denied this proposition, and held otherwise. In that case the recital was untrue, but that fact does not diminish the force of what is said by the Court on this point. The recital is a mere formula, used in every grant, whether applicable or inapplicable to the facts of the case. The Court says: "The recital was probably taken from the usual forms in which grants were written; it certainly was not inserted or intended to have any influence upon the direction of the title. The term 'family' is not limited to the husband and wife. Alviso had, at the time, several children by a previous marriage, and if the use of the term in the recital can have any effect upon the direction of the title, it is difficult to see why those children might not claim to have received an interest

in the property equally with the wife, or the community existing between the husband and wife. Such an effect was never supposed to exist, it is believed, by any one."

Yet in this case the recital is relied upon to show right, not only in the children, but in more distant relatives, and necessarily in the one hundred or more unnamed and uncivilized Indians, all of whom constituted the "family" of the petitioners.

The question here is one of construction. What was the intention of the Government? Was it to grant the land to José de Jesus and Sisto Berreyesa alone, or to grant it to them in common with all their relatives, and the hundred or more uncivilized Indians? In both petitions the applicants ask for the land for themselves alone. The report of Jimeno is that it can be conceded to them, and not to them in connection with anybody else. They, and they alone, are the persons "referred to" who may occupy it in colonization.

The title is directed by the Governor's order to issue "in accordance with the Secretary's report." In the decree of concession, which is declared to be made "in view of the petition," and the "foregoing reports," the Governor declares "José de Jesus and Sisto Berreyesa owners of the place." [530] In the grant the Governor, reciting their petition, declares that he has determined to concede to them the said land, declaring the same to be their property. And all the conditions refer to them alone. They are not to alienate nor incumber it; they may inclose it; they shall enjoy it freely and exclusively, devoting it to the use which may be most convenient; they are to build a house upon it; they shall solicit the juridical possession; if they violate the conditions they shall lose their right; and the document is to serve them as a title, and to be held firm and valid. Language could not be used which would more absolutely exclude the idea that any other person than José de Jesus and Sisto Berreyesa were to be owners of any part of the land. How can they be owners, and enjoy the property "freely and exclusively," and yet their families, parents, brothers, and Indians, be also part owners?

The appellants' brief cites sundry authorities upon the question, how and by what words a trust may be created.

We do not propose to examine them. They relate to trusts under the common law, and are inapplicable in considering the construction of an instrument made in California in 1843 under the Spanish law, which discountenanced, if it did not prohibit, the creation of any estate in trust. (2 White's Recop. 181; *Gortario v. Cantu*, 7 Texas, 35.)

For a further and all-sufficient reason it is unnecessary to enter upon any review of these authorities, with a view to determine to a nicety what words will and what will not create a trust. There must be some intention manifested by the words of a grantor that the whole beneficial interest in the property granted shall not vest in the grantee. And we are content to submit this case on the proposition, that no such intention appears from the *espediente* and grant in this instance; but, on the contrary, the manifest will and intention of the grantor were to grant the property to José de Jesus and Sisto Berreyesa, absolutely and exclusively. We do not see how any authorities can help the appellants, unless they go to the extent of holding that a trust may be made by the judgment of the Court, though it was never declared by the grantor, nor intended by him to exist.

[531] \*The appellants seek to derive some support for their claim from the expression made use of in the report of Jimeno of the thirtieth of October, that the land "may well be conceded, in order that the persons referred to may occupy it in colonization, without being permitted to sell or alienate." They assume that the "persons referred to" are "all the families;" that there is some distinction, under the colonization law and regulations, between grants to individuals and grants to families; that the land was refused the two individuals, José de Jesus and Sisto Berreyesa, because they were not able to cultivate and inhabit it all, but was granted to the several families because they could occupy and cultivate it; and they ask whether the fact that this grant, asked for by two in the name of all, restricts the title to two and defeats the title to all?

To this we reply: First—That, as we have before stated, and as is clear from the perusal of the petitions, the two never asked for the land in the name of all, or in anybody's name but their own. Second—That, though it were conceded to

have been refused the two applicants when they first asked for it, it was subsequently granted to them, when they explained to the Governor how numerous were the families and dependents for whom they had to provide; and it was never granted to the "several families" at all, but only to José de Jesus and Sisto Berreyesa, exclusively. Third—That the expression in the report—"persons referred to"—relates only to the two petitioners, as is apparent from the whole report, and from the subsequent action of the Governor, in making the grant, "in accordance with" the report, to the two petitioners alone, and in imposing upon them the restriction, recommended by the Secretary, in regard to the power of alienation. Fourth—That even if it be otherwise, and the "persons referred to" intended "all the families," and it was the recommendation of the Secretary that the grant should be made to the petitioners with a view that "all the families" should continue to occupy the land, yet no one would have any right in the land, or be an owner of any part of it, but the two grantees named—for the grant must control, and it constitutes the two the owners of the land. And this would be so, even if the intention were clear from the grant itself that the occupation of all the families should continue, for the grant being made to the \*two petitioners alone [532] would contemplate only the continuance of the occupation of all the families under such arrangements and contracts as might be made between them and the grantees.

We would refer the Court to opinions delivered in two cases, and which support our views. The *espediente* and grant of John A. Sutter may be found in 10 Cal. 502-504. In his petition, he states his object in asking the grant to be the establishment of twelve families; in the grant, it is recited that he had asked the land for his personal benefit, and that of the twelve families; and the land was granted to him "for himself and his colonists." The Board of Land Commissioners confirmed the grant upon reasons which entirely support our position in the case at bar. And in their opinion the Supreme Court of the United States seems to have acquiesced. (*United States v. Sutter*, 21 How. 177.)

In the case of the *United States v. Weber*, a grant of similar form was passed upon. It was made to William Gulnac, who

in his petition represented that he was a man of family, and had so many head of cattle and horses, specifying the number, and that there were other persons of his class who bound themselves to be in his company for the purpose of forming a kind of pueblo in the country. In order to carry this arrangement into effect, and for the security and increase of his own property and that of the persons referred to, he prayed a grant of eleven leagues. The Secretary reported that it would be proper to know whether the land Gulnac asks for is for the formation of the colony he mentions, for in that case it appears necessary that the names of the persons who form it should be expressed, in order that in the title it may be explained that the land is for the benefit of all, and that if he petitioned for himself the extent was very great. The Governor then ordered that Gulnac should say whether he asked for the land for the colony, and in that case the title should issue, and should mention the names of the partners.

Without any further representation from Gulnac, a decree of concession was made to him, "for his own personal benefit and that of his family, and also that of eleven other families." Upon this decree a grant was made, which recites that Gulnac has asked for the land "for his own personal benefit, [533] for that of his family, and \*eleven other families," and granting the land to Gulnac, declaring him the owner, and containing precisely the same clauses and conditions as are contained in the grant to José de Jesus and Sisto Berreyesa.

In determining the nature of this grant and its legal effect, the Land Commissioners say: "The recital of the Governor in the grant, that the said Gulnac had solicited the grant for his own personal benefit and that of his family, and that of eleven others, carries with it no benefit to the families, inasmuch as no particular families are named; and none can claim its benefits except the family of Gulnac, and they only so much as the law would assign to them by way of inheritance on the decease of Gulnac. The grant is to him (Gulnac) declaring to him the ownership. There is nothing in the grant that would indicate a design on the part of the grantor to pass any particular interest to any one but Gulnac; but to pass the whole title to Gulnac, and leave him to contract with

whom he pleased to settle the land, and on such terms as might suit him. The grant then was to Gulnac." And to the same effect was the opinion of Judge Hoffman. (1 Hoffman, 126.)

The twelve families referred to in the Sutter grant, the eleven in the Gulnac grant, and "all the familles" mentioned in the grant to José de Jesus and Sisto Berreyesa, could occupy the land "in colonization," only in the same way, not in virtue of any ownership derived from the grant, but under the grantees, and through such arrangements as they might make with the grantees. It might well be questioned whether even this much was contemplated by the Government in the present case.

*Counsel for Appellants, in reply.*

The entire argument for the respondent Schultz amounts to this: that the facts set forth in the petition, in regard to the parents and brothers and sisters, considered in the report of the Secretary, and recognized in the grant, are mere inducements to the grant, and that the legal title passed to the grantees entirely unaffected thereby.

To this we reply that this proposition is true in one sense, and in another sense it is not true. If the petition of Jesus and Sisto Berreyesa was wholly their own act, [534] and made by themselves alone, and for their own benefit exclusively, and without any privity or agreement with their parents and brothers and sisters, then the averments of the petition, reports, etc., were mere inducements to the grant, and the title passed to Jesus and Sisto Berreyesa discharged of any equity in favor of the parents and brothers and sisters. If, on the contrary, at the time this petition was presented, it was the intention of the entire Berreyesa family to ask for the land in common, and live on it, and hold and enjoy it in common, and Jesus and Sisto Berreyesa, in presenting the petition, did it with the knowledge, consent, and coöperation of the parents and brothers and sisters, and with the intention and understanding not to acquire it for themselves alone, but for all the members of the family in common, then the title passed to Jesus and Sisto Berreyesa, but charged with an equity in favor of each of the members of

the family for an undivided share. This last proposition is the proposition of the pleadings and the *expediente*.

There is no analogy between this case and *Scott v. Ward*. In that case Alviso acted for himself alone, and with the intention to get the land for himself alone; whereas, in this case, Jesus and Sisto petitioned for the land for themselves in common with others, and with the intention of obtaining it for themselves in common with others. This is shown by a common entry before the grant, by a common holding and a common improvement after the grant for upwards of twenty years, and by the title papers themselves in connection with the acts of the parties.

If the case stood on the *expediente* alone, there might be some ground for the argument which has been pressed with so much boldness by the counsel for the respondent; but in connection with the acts and intentions of the parties, which for good reasons he has kept studiously out of sight, it loses its force. We dispute nothing which has been decided in *Scott v. Ward*, in the Sutter case, or in the Weber case. *Scott v. Ward* would be an authority for Schultz, if Alviso having children of his own who were owners of stock, had proposed to them to join their stock to his, and settle on the land, he to petition for it in his own name, but for common account. If in such a case the Court had denied the [535] claim of the \*children, the authority would have been in point against us. If Maria Luisa Peralta, having cattle of her own, and Ignacio Alviso having cattle of his own, had agreed to marry, to settle on a ranch, and obtain a grant therefor through Alviso, and in his own name, but for joint account, then the case of *Scott v. Ward* would be like this; and then, it is submitted, that the equity of the wife would not have been denied. But, instead of that, the decision amounts only to this: that a man's family have no interest in his grant though the fact that he had a family may have been the reason why he obtained it. To have decided the case differently would have been mere robbery; for a man's status or quality of married man is as much his own as his cattle. But the cattle of a man's parents and brothers and sisters are not his own; and if the parents and brothers and sisters put their cattle into a common stock, and their persons into a



common settlement, in order to obtain a common rancho, the one in whose name it issued cannot be honest and deny the rights of the others; most of all, after they have enjoyed, and he has acknowledged them, for more than twenty years. As between the Government and the petitioner, the colonists to settle, and the cattle to stock, the rancho, may be mere inducement to an act which when made may still be a donation. But as between the petitioner and his co-colonists, the settlement and the cattle being the means of obtaining the grant, and being used by him for that purpose for the common benefit, the interest or share of the co-colonists in the donation is as much a purchase as if it had been paid for in gold.

It is in this connection that the facts presented by the *expediente* are so important. Jesus and Sisto are offered what land "they can stock" (settle.) This is what they want, but not what the family want. The family have stock as well as they; the family are living on the rancho as well as they; and they "desire all to live on the same place which they (we) solicit." Therefore Jesus and Sisto re-petition for the land, setting forth these facts. On this petition Jimeno, "in consideration of the number comprising all the families," reports that the land "may well be conceded, in order that the persons referred to may occupy it in colonization." On the coming in of the report, the Governor ordered that "the \*title issue in accordanc with the report of the [536] Secretary;" and the grant shows on its face that this order was obeyed. We say then that the consideration for this grant, that is, the means for obtaining it, was furnished, or paid, by all the family in common, and that they are therefore entitled to the land, share and share alike.

To hold otherwise is to disregard the plain language of the *expediente*, which says it may be granted "in consideration of the number comprising all the families." From the beginning it was known that Jesus and Sisto had families, for they recite the fact in their first petition. But the Governor, in the face of this fact, refused the grant, except to the extent that Jesus and Sisto could stock (settle) it; and it was not until the large colonization set forth in the second petition was promised that he made the grant; and when he did, it was

"in consideration of the number comprising all the families." The acknowledgment of the source of the title is confirmed by the acts *in pais* of the parties interested, for more than twenty years. The second petition asserts that the family wanted all the land for their herds and their sowings, and that they all wanted "to live on the same place." The facts are that they were then on the place; that some of them lived and died there, and that the rest lived there and are there still. Till the eleventh of January last, when Schultz (who bought with full notice, and when both the plaintiff Berreyesa and the defendant Beasly were in possession) brought his ejectment against Beasly, the title has never been questioned. If for no other reason, the assignee of Jesus and Sisto Berreyesa should be estopped to deny a claim which rests upon an adverse possession acknowledged daily for upwards of twenty years. How, in the face of the petition declaring that the land is asked for, for the benefit of the family, and in face of the acts of the petitioners giving the family the benefit of it for nearly a quarter of a century, can the grantees or their assignees deny it?

In *Trevino v. Fernandez*, 13 Texas, 630, the lands in question were denounced by two brothers, Bartolome and Eugenio Fernandez, and the title recited the payment of the price by both, and the officer was ordered to put the grantees in [537] possession. In doing \*this he, the officer, extended the title to Bartolome alone, and it was objected on the trial that this defeated Eugenio's right. The Court overruled the objection and said: "He," the officer, "had no authority to depart from the grant or to deprive one of the grantees of his right; and his act, placing only one in possession of the whole of the lands, must be regarded as inuring to the joint benefit of both."

Here, upon the same principle, the grant though issued to two, having been paid for by the family, will inure to the use of the family. And the same result would have followed even though the *espediente* had not mentioned the family, or the Governor had never heard of them. Shall it be said, then, that the brothers and sisters are to fare worse because they are mentioned, than they would have fared if they had not been mentioned? It being borne in mind that there is no

question to whom the legal title passed, but only in whom the beneficial interest is vested.

The counsel has also referred to the grant to Gulnac, which was assigned by him to Charles M. Weber. Though that case was probably not well decided, it nevertheless does no damage to this. The Land Commissioners, it is true, decided that the grant was to Gulnac; but they say also that Gulnac was free "to contract with whom he pleased to settle the land, and on such terms as might suit him." This is precisely what was done by José and Sisto with the other members of the Berreyesa family. The land was to be held in common to protect a settlement in common already made. And in view of the treaty of Guadalupe Hidalgo, this Court will be slow to refuse to execute an agreement of this sort when the fourteenth article of the law of August 18th, 1824, expressly guarantees the contracts which *empresarios* may make with families, provided they are not contrary to the laws. Indeed, the Land Commission has vindicated the rights of the co-colonists in this very case. In the case of *Justo Larios et al. v. The United States*, which was a claim by the eleven settlers on the Gulnac grant for a part of it, the Commissioners in delivering their opinion said: "If the claimants in the present case are entitled to an equitable interest in the land, a confirmation to Gulnac or his alienee, Weber, would not affect their right, but would create a trust in their favor \*to the extent of that contract which might be [538] legitimately asserted before the local tribunals of the country."

As for the Sutter case, to which the counsel has also referred, it is perfectly evident from the *expediente* and all the facts, that the enterprise was Sutter's own, and that the families who followed him were mere dependents with whom he was free to make such arrangements as he saw fit. But in this case and Gulnac's case, the whole proceeding, from its initiation to its consummation, was not a separate, but a joint enterprise, in which all were equal. The unanswerable proof of this is, that the settlement preceded the petition, and continued after the grant, which in neither case would have been made, as appears by the *expedientes*, but for the settlements. Even in the Sutter case, the Land Commissioners, in deliver-

ing their opinion, took pains to declare that the grantee in making settlements, "was at liberty to make such contract with his settlers as might be mutually agreed on between them, provided they were not contrary to the law of the land, or inconsistent with the purposes and intent of the grant."

But here it is admitted that all the brothers and sisters occupied as tenants in common before the grant was made, and that they have ever since occupied as such. Surely this would raise a conclusive presumption, in the absence of any other evidence, that the two grantees who received the legal title agreed that the interest of each brother and sister should be that of an equal tenant in common.

FIELD, C. J. delivered the opinion of the Court—COPE, J. and NOETON, J. concurring.

These two actions turn upon the same question, and by stipulation of the parties have been presented and argued together. The first is a bill in equity to subject the property held by the defendant to certain trusts in his hands, and to compel the execution to the plaintiff of a deed of an undivided interest therein. The second is an action of ejectment, to which the defendant therein sets up as an equitable defense substantially the same matters which are urged for relief in the first action. A demurrer to the complaint in the first case, and to the answer in the other, was sustained, and judgments entered thereon.

[539] \*As appears from the documents annexed to the complaint, and constituting part thereof, in July, 1843, José and Sisto Berreyesa presented a petition to the Governor of California for a grant of land known by the name of Las Putas, of about eight leagues in extent, referring in their petition to a previous provisional permission to occupy the same given by the Military Commandante of Sonoma. Upon this petition the Secretary gave a favorable report, and in October, 1843, the Governor made an order that a title issue to the petitioners for so much of the land as they could "settle." It does not appear that any title was ever issued upon this order, but for some reasons, which are not stated, the petitioners seemed to have considered the concession which it directed as embracing four leagues of the tract so-

licited; and on the following day they presented a second petition to the Governor, asking a grant of the other four leagues. Upon this petition the Secretary made a favorable report, and on the third of November, 1843, the Governor ceded to the petitioners the entire tract, and on the same day issued to them a formal grant of the premises.

The position of the appellants is that this grant was intended, not merely for the benefit of the grantees named therein, but also for the benefit in equal shares of all the members of the Berreyesa family—the fathers, brothers, and children of the grantees. In support of this position they rely upon three circumstances:

*First*, the implied refusal of the Governor to grant the entire tract of eight leagues solicited in the first petition of the two Berreyesas;

*Second*, the language of the second petition and the report of the Secretary made thereon; and

*Third*, the recital in the grant itself.

We have carefully considered these circumstances, and do not find in them any support to the position taken.

1. There is nothing in the order of the Governor directing a title to issue to the petitioners for so much of the land solicited as they could "settle," which justifies the inference that he refused to grant the entire tract in consequence of the limited quantity of stock which the petitioners possessed. The report of the Secretary upon the petition presented refers only to the character of the petitioners \*and the [540] improvements they had made or commenced. It contains no allusion to their property or ability to stock or otherwise use the land. Nor does the Governor intimate any reasons for the order he made. It is a sufficient answer to the argument which rests upon the character of this order, to observe that no action was based upon the order. The grant which transferred the title was not issued upon it.

2. The second petition presents circumstances for the consideration of the Governor, in addition to those urged in the first petition. The Berreyesas sought a grant of the tract of eight leagues, and in their first petition they merely represented that they were married, and had children, and also had a considerable number of cattle and horses, and needed

land on which to place them. This representation did not secure the desired concession. The petitioners therefore presented a second petition on the subject, in which they put forward the further consideration, that their families were very large, and included their parents, children, and brothers, and besides that there were more than one hundred uncivilized Indians in their neighborhood, whom it was necessary to maintain, and that the four leagues ceded were insufficient for their purposes. The report of the Secretary upon this petition speaks of it as one presented for the benefit of the petitioners, and of their parents, children, and brothers; but the petition itself shows that the parents, children, and brothers were referred to only as inducements for enlarging the bounty of the Government. It was necessary for the petitioners to provide for their large family, and also for the maintenance of the neighboring Indians, and therefore they asked for the entire tract. The report of the Secretary, read in connection with the petition, only means that the petition showed that the parties, who constituted the family of the petitioners, would be benefited by the grant, not that the title was sought in the names of those parties. The benefit to the parents, children, and brothers, was one which would flow from the means which the grant would furnish to the petitioners for their support.

3. The recital in the grant does not control the direction of the title. The petition was presented by the two Berreyesas; the concession of the Governor preceding the [541] issuance of the grant in form \*declares them by name to be the owners of the land; the grant designates them as the parties to whom the land is ceded; the conditions annexed refer to them alone; *they* are not to alienate or incumber it; *they* may inclose it; *they* shall enjoy it freely and exclusively; *they* are to build a house upon it; *they* shall solicit the juridical possession; *they* shall lose the right to the land if *they* violate the conditions; and it is to *them* that the grant in question is to serve as a title. Language could hardly be used, as counsel very justly observe, more absolutely excluding the idea that any other person than the two Berreyesas were to become invested with the title. The recital discloses the inducements which operated upon the Governor to make the

grant, but these inducements have no effect upon the character of the grant or the course of the title. In *Frique v. Hopkins*, 4 Martin, N. S. 214, it was claimed that land granted to the ancestor of the plaintiff by the King of Spain was common property, and in considering the question presented, the Court said: "By the regulations of the Spanish Government, if the individual who applied for land was unmarried, a certain quantity of land was given to him; if he had a wife, this quantity was increased; and if he had children, an additional number of acres was conceded. Now, if the circumstance of his being married made the thing given become the property of both husband and wife, we must, on the same principle, hold, that where children were the moving cause, they too should be considered as owners in common of the land conceded. But that such was the effect of the donee having a family, we believe was never even suspected—it certainly is unsupported by law. Many donations are made, in which the donee's having a wife, and being burdened with a large family, is a great consideration for the beneficence of the donor; but this motive in him does not prevent the person to whom the gift is made from being considered its owner, nor prevent the thing given from descending to his heirs."

The Mexican Regulations of 1828 require the applicant for lands, whether he be an *empresario*, head of family, or private person, to set forth in his petition to the Governor "his name, country, profession, the number, description, religion, and other circumstances of the families or persons with whom he wishes to colonize;" and \*though these par- [542] ticulars constituted considerations with the authorities in whom the granting power was vested, it was never supposed that they in any respect controlled the course of the title against the operative words of transfer in the grant. To positions of this nature the language from the Louisiana case may be repeated—the cause moving to the grant "does not prevent the person to whom the gift is made from being considered its owner, nor prevent the thing given from descending to his heirs." As it "was never even suspected," says the Court in that case, that the land granted became common property, from the fact that the donee had a family, so it may with equal truth be said in the present case, that it would

never be suspected, except for the very ingenious and learned argument of counsel, that the land granted was owned by the parents, brothers, and children, in equal shares with the petitioners, from the fact that they constituted a portion of the family of the latter.

The grant to Sutter and the petition upon which it was issued furnish an illustration of the views we have thus expressed. The grant and petition are both found in the report of the case of *Ferris v. Coover*, 10 Cal. 592. In the petition Sutter states that he solicits the land for the enlargement of his enterprise and the establishment of twelve families. The grant recites that he asked the land for "his personal benefit and that of twelve families," and cedes the land to him, "for himself and his colonists." Yet the Board of Land Commissioners held that the title vested solely in Sutter, and that the peculiar language of the recital of the grant in no respect impaired his rights, or conferred any special rights upon the other settlers. In considering the nature of the grant, Mr. Thompson, of the Commission, after observing that the Mexican Regulation of 1828 makes no distinction in the legal effect of the several classes of grants provided for by it, said: "The only difference is in the purposes for which it is made, and the consequent variance in the character of the conditions imposed or implied by it. A grant to an individual imposed the condition of occupation or cultivation, as the consideration on which it was founded, and was usually made to him for his own benefit and that of his family; but it has never been contended that the rights of the grantee in the premises were in any degree impaired by the use of [543] \*this language, or that it conferred any special rights, legal or equitable, on his family. The full right of property vested in the grantee, subject only to the general provisions of the laws on the subject. So in the case of an *empresario* grant, it involved the condition of the introduction and settlement of the land of twelve or more families, according to his stipulation; and it might, as in the present case, be made to the grantee for his own benefit and that of his settlers; but the use of this language would not, any more than in the former case, confer any special rights on the settler. The words of grant apply to the grantee alone, and those



which follow were probably inserted to indicate the nature of the grant and the purpose for which it was made." And again: "In relation to the terms and conditions on which the settlement was to be made, the regulations are entirely silent. The only provision we have been able to find on that subject is contained in the fourth article of the law of August, 1824, which simply guarantees the contracts which the *empresario* may make with his settlers, and imposes no restrictions on such contracts, further than that they shall not be contrary to the laws of the Republic. From this it would appear that the matter was left entirely to the *empresario*, to make such arrangements with the colonists in conformity with the law and objects of the grant, as might be satisfactory and advantageous to the parties. After a careful examination of this branch of the subject, we are satisfied that the effect of the grant was to vest the right of property in the grantee, Sutter, subject to the condition of settling twelve families on the premises granted; and that in making such settlements he was at liberty to make such contract with his settlers as might be mutually agreed on between them, provided they were not contrary to the law of the land, nor inconsistent with the purposes and intent of the grant."

The decree of the Commission confirming the title to Sutter alone, so far as it rested upon the grant mentioned, was affirmed by the Supreme Court of the United States; and we are not aware that the correctness of its views upon the nature and operation of the grant has been called in question by any tribunal.

Judgment affirmed.

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\*THE PEOPLE v. BELENCIA.

[544]

**PROOF OF DRUNKENNESS ON TRIAL FOR MURDER.**—On a trial for murder, under our statute, where the means employed in the killing are not such as to determine the degree of the offense, proof that the defendant was drunk at the time of the killing is admissible in his favor.

**KILLING IS PRESUMPTIVE MURDER.**—Presumptively, every killing is a murder; but so far as the degree is concerned, no presumption arises from the mere fact of the killing, considered apart from the circumstances under which it occurred.

**MURDER, DEGREE OF.**—The question of degree is one of fact, to be determined by the jury from the evidence; and drunkenness, as evidence of a want of premeditation, is not within the rule which excludes it as an excuse.

<sup>1</sup> **DRUNKENNESS NO EXCUSE FOR CRIME.**—A man who is drunk may act with premeditation as well as a sober one, and is equally responsible for the consequences of his act; but in determining the question of premeditation, the defendant's condition, as drunk or sober, and any other fact tending to show his mental *status* at the time, is proper for the consideration of the jury.

**IDEM—WEIGHT OF EVIDENCE.**—The weight to be given to such evidence is a matter for the jury to determine; but it should be received with caution, and carefully examined in connection with the other circumstances.

### APPEAL from the Eleventh Judicial District.

**Indictment for murder.** Before the trial the prisoner asked a continuance upon the ground of the absence of witnesses, by whom he could show that at the time of the commission of the homicide charged he was so intoxicated as not to know right from wrong. The District Attorney objected solely upon the ground that the evidence, if produced, would be incompetent, and the Court sustained the objection, to which the defendant excepted. Subsequently, during the progress of the trial, the defendant asked a question of a witness for the purpose of eliciting similar proof, as to his drunkenness, which was excluded for the same reason, and exception taken. Defendant was convicted of murder in the first degree

*Thos. H. Williams*, for Appellant.

The evidence of intoxication was clearly admissible to show the want of that deliberation, willfulness, and premeditation required by our statute to constitute murder in the first degree. It was not offered to mitigate or excuse the offense, but to show that the offense of which he was con-  
[545] victed—murder in the first degree—was not \*committed. The doctrine contended for is clearly laid down in the decisions, based upon statutes similar to ours, collected in 1 Bennett & Heard's Leading Cases, 120-124.

*Attorney-General*, for Respondent.

COPE, J. delivered the opinion of the Court—FIELD, C. J. and NORTON, J. concurring.

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<sup>1</sup> Commented on and approved in *People v. King*, 27 Cal. 514; *People v. Williams*, April T. 1872 (not reported); and see *People v. Harris*, 29 Cal. 683; *People v. Nichol*, 34 Cal. 217; *People v. Blake*, 65 Cal. 278; *People v. Langton*, 67 Cal. 429. See 19 Mich. 418; *People v. Williams*, 43 Cal. 352.

This is an appeal from a conviction upon an indictment for murder. On the trial of the case the defendant offered to show that when the homicide was committed he was so drunk as to be incapable of distinguishing between right and wrong. The Court excluded the evidence, holding that drunkenness, whatever its effect may have been upon the mental condition of the defendant, was no excuse for the commission of the offense. The exclusion of this evidence is assigned as error, and it is contended that under our statute creating two degrees of the offense the evidence was admissible, as indicative of the degree in which the defendant was guilty.

The statute provides that "all murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, etc., shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, designate by their verdict whether it be murder of the first or second degree." In this case, the means employed in the killing were not such as to give character to the offense, and whether it was murder of the first or second degree depends upon the presence or absence of deliberation and premeditation in the commission of the act. If it was deliberate and premeditated, it was murder of the first degree; otherwise, it was murder of the second degree; and in determining the degree any evidence tending to show the mental *status* of the defendant was a proper subject for the consideration of the jury. The fact that the defendant was drunk does not render the act less criminal, and in that sense it is not available as an excuse, but \*there is nothing in this to ex- [546]clude it as evidence upon the question as to whether the act was deliberate and premeditated. It was murder, whether premeditated or not, and as between the two degrees of the offense there is no presumption or intendment of law in favor of the first. Presumptively, every killing is a murder; but so far as the degree is concerned, no presumption arises from the mere fact of the killing, considered separately and apart from the circumstances under which the killing occurred. The question is one of fact, to be determined by the jury from

the evidence in the case, and is not a matter of legal conclusion; and drunkenness, as evidence of a want of premeditation, is not within the rule which excludes it as an excuse. It neither excuses the offense, nor avoids the punishment which the law inflicts when the character of the offense is ascertained and determined; and in admitting it, with reference solely to the question of premeditation, we encounter none of the evils against which the rule referred to was intended to operate. In cases of premeditated murder, the fact of drunkenness is immaterial; a man who is drunk may act with premeditation as well as a sober one, and is equally responsible for the consequences of his act. It is necessary however, to prove that the act was premeditated, which involves, of course, an inquiry as to the state of mind under which the party committed it, and in the prosecution of such an inquiry his condition, as drunk or sober, is proper to be considered. The weight to be given to it is a matter for the jury to determine, and it is sufficient for us to say that it should be received with caution, and carefully examined in connection with all the circumstances of the case.

In *Pirkle v. The State*, 9 Humph. 663, the same question arose under a statute of Tennessee similar to ours, and the Court, after reciting the statute, said: "It will frequently happen, when the killing is of such a character as the common law designates as murder, and it has not been perpetrated by means of poison, or by lying in wait, that it will be a vexed question whether the killing has been the result of sudden passion, produced by a cause inadequate to mitigate it to manslaughter, but still sufficient to mitigate it to murder in the second degree, if it be really the true cause of the excitement, or whether it has been the result of deliberation

[547] \*and premeditation; and in all such cases, whatever fact is calculated to cast light upon the mental *status* of the offender is legitimate proof; and, among others, the fact that he was at the time drunk, not that this will excuse or mitigate the offense if it were done willfully, deliberately, maliciously, and premeditatedly, but to show that the killing did not spring from a premeditated purpose, but sudden passion, excited by inadequate provocation, such as might reasonably be expected to arouse sudden passion and heat to the

point of taking life, without premeditation and deliberation. This distinction never can exist except between murder in the first and murder in the second degree under our statute. \* \* \* If a drunken man commit willful, deliberate, malicious, and premeditated murder, he is in legal estimation guilty as if he was sober. If he do it by means of poison knowingly administered, or by lying in wait, these facts are as conclusive evidence against him as if he had been sober. If, from the proof, in the absence of such lying in wait, or administering poison, it shall appear that the killing was willful, deliberate, malicious, and premeditated, he is guilty as though he were sober. But in ascertaining the fact of such intention all the concomitant circumstances shall be heard, in order to enable the jury to judge whether such deliberate, willful, malicious, and premeditated design existed, or whether the killing was not the result of sudden heat and passion, produced by a sudden and unexpected controversy between the parties, but of such a character as not to mitigate the slaying to manslaughter. As between the two offenses of murder in the second degree and manslaughter, the drunkenness of the offender can form no legitimate matter of inquiry; the killing being voluntary, the offense is necessarily murder in the second degree, unless the provocation were of such a character as would at common law constitute it manslaughter, and for which latter offense a drunken man is equally responsible as a sober one."

We are of opinion that the Court erred in excluding the evidence offered; and the judgment is reversed, and the cause remanded for a new trial.

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\*TABLE MOUNTAIN TUNNEL CO. v. STRANAHAN [548]  
HAN *et al.*

RULINGS OF SUPREME COURT—LAW OF THE CASE.—Where the Supreme Court, in reversing a judgment and remanding the cause for a new trial, consider and pass upon a point of law, with a view to the new trial for the purposes of which it is important, the ruling upon such point, though not essential to the decision, becomes the law of the case in all its future stages.

**IDEM.**—Thus, on an appeal from a judgment in favor of defendant in an action to recover a mining claim, the cause was remanded for a new trial on the ground that certain evidence of location offered by the plaintiff had been erroneously excluded and certain mining laws improperly admitted. In an opinion giving its reasons for the decision, the Court discussed the effect of a location in the absence of mining laws, and declared certain principles of law applicable to such locations. On the new trial the lower Court was asked by defendant to give, as an instruction to the jury, a portion of the opinion embracing the declaration of legal principles above referred to, which it refused to do: *Held*, on a second appeal that the rules of law thus declared in the former opinion, whether intrinsically correct or not, were the law of the case, and that it was therefore error to refuse the instruction.

### APPEAL from the Fifth Judicial District.

A report of the proceedings on the former appeal will be found in 20 Cal. 198. All other material facts are stated in the opinion.

*A. P. Crittenden*, for Appellant.

The Court erred in refusing to give the instruction which was copied from the opinion of this Court on the former appeal. It is the law of this case, and neither the District Court nor this Court could refuse to apply it. (*Davidson v. Dallas*, 15 Cal. 82; *Phelan v. San Francisco*, 20 Id. 39; *Haynes v. Meeks*, Id. 288; *Leese v. Clark*, Id. 387.)

The instruction is not in conflict with any rule laid down in *English v. Johnson*, or any previous decision, but if it were, it should still have been given. It was a part of the former opinion declaring a rule of law upon a point presented, argued and adjudicated upon that appeal. One of the propositions of the plaintiff on that appeal was that proof should have been allowed of certain acts of plaintiff's grantors, as acts of possession, though they were not done under any mining law, and that the Court below erred in ruling out the evidence. Against this it was urged that if such acts, in the absence of any mining law, were evidence of possession, then there was no limit to the extent of ground which a single person might take up, and a whole mining district might be taken up and monopolized by an individual. The Court held this answer insufficient; that there was a limit to the extent; that it must be reasonable; that if it was unreasonable, "the location would not be effectual for any purpose;" and that therefore the evidence was admissible,

and the former judgment in favor of the defendants must be reversed

*H. P. Barber*, for Respondent.

I. The instruction asked was properly refused. It embraces the following proposition:

"If the quantity of ground included be unreasonable, the location will not be effectual for any purpose, and possession under it will only extend to the ground actually occupied."

A single charge must be correct in all its parts; if incorrect in any part it is liable to rejection. (*Vallance v. King*, 3 Barb. 548; *Fischer v. Webster*, 13 Cal. 60; *Thompson v. Paige*, 16 Id. 79.)

The charge asked was erroneous as a whole; the proposition that if the quantity originally located were unreasonable, the location would not be effectual for any purpose, would be manifestly inequitable and unjust, and directly opposed to the decision of this Court in *English v. Johnson*, 17 Cal. 118.

II. But it is contended that plaintiffs are concluded on this point, defendants asserting that this Court so ruled in its former decision in this case.

If this question of unreasonableness of extent were directly presented to and adjudicated by this Court in its former decision, we do not controvert the conclusion. But the question was not presented in the former case in any way, nor do the briefs of either side refer to it. Plaintiffs below, the appellants on that appeal, submitted eleven exceptions to this Court, not one of which involved this question. This Court reversed the judgment solely on two of them: the first, taken on the ground that the Court below had \*ex- [550]cluded all testimony of marking bounds, etc., done by our grantors previous to our incorporation; and the other involving the admissibility of the "Wallaville" laws in evidence in consequence of not being properly pleaded.

These were the sole points then decided by this Court. The point now raised by the charge requested, was not then argued or adjudicated, and the remark of this Court now relied on as an estoppel, was merely in reply to a "suggestion" of defendants' counsel, as is evident from the opinion itself. But to work an estoppel as the law of the case, the opinion

must relate to the very point decided. "When a case has once been taken to an Appellate Court, and its judgment obtained on points of law involved, such judgment becomes the law of the case." (*Clay v. Hoagland*, 6 Cal. 487.) The "point of law" in our former case was the admissibility of the evidence referred to—the "judgment," that it ought to have been admitted. In *Davidson v. Dallas*, 15 Cal. 75, relied on by appellants, the question arose as to the very point on which the former decision "rested," and the Court expressly say, (p. 83,) that upon an appeal, the case is brought to this Court, "in order that the judgment of the Court may be obtained upon the matters assigned as errors." (See, also, pp. 83, 84.) In *The State v. McGlynn*, 20 Cal. 233, the Court say: "The law upon the question does not become settled by the mere opinion of Judges unnecessarily expressed, but only by a decision of the point, when being the ground, or at least one of the grounds, of a judgment." So in *Fulton v. Hanlow*, Id. 450.

"In order that a judgment should be a defense in another action on the ground of *res judicata*, the same point must have been directly in issue, and determined by the judgment."

In *Pierce v. Robinson*, 13 Cal. 116, this Court expressly decided that a former opinion as to the admissibility of parol evidence to show that a deed absolute on its face was intended as a mortgage, was not binding upon the Court; because, although it decided adversely to that proposition, it "was irrelevant" to the points assigned for error and directly decided.

It would be very hard indeed if the mere opinion of the Judges upon a first impression, and upon a question [551] not arising in the \*points assigned for error, should be held to conclude the adverse party who had no opportunity to argue the point, and might have shown by argument or authority, in case he had been called upon, that the opinion was erroneous

COPE, J. delivered the opinion of the Court—FIELD, C. J. and NORTON, J. concurring.

This case was before us at the April Term, 1862, on appeal from a judgment in favor of the defendants. The judgment was reversed, and the cause remanded for a new trial, and the



present appeal is from a judgment in favor of the plaintiff. The plaintiff is a mining corporation, and the facts, as elicited at the trial, are not materially different from those stated in our previous opinion.

The point in dispute is the location of a mining claim, and one of the errors assigned is, that the Court refused the following instruction: "No location of a mining claim can be so extended as to amount to a monopoly, and in the absence of local regulations prescribing a limit, recourse must be had to general usage. If the quantity of ground included be unreasonable, the location will not be effectual for any purpose, and possession under it will only extend to the ground actually occupied. In other words, the extent of the occupancy will determine the extent of the claim, and whether the quantity be unreasonable or not, must depend upon the customs prevailing generally upon the subject."

This instruction was taken literally from the opinion delivered by us when the case was here before; and it is difficult for us to understand upon what ground the Court refused to give it. It is too late now to discuss the question of its correctness, for the matter has been adjudicated; and whatever doubts may exist in regard to the conclusion arrived at, it has become the law of the case. The counsel for the plaintiff contends that the point was not involved in the questions raised on the former appeal, and that so much of the language used as limits a location in the case put to the extent of the actual occupation, was mere *obiter*. It is true, perhaps, that an opinion upon the point was not essential to the decision of the case; but it was important for the purposes of a new trial; and it \*was in that view that we considered [552] the matter and passed upon it. It was a matter necessarily involved in the issue to be tried, and the principle of *res judicata* is undoubtedly applicable to its determination.

The judgment is reversed, and the cause remanded for a new trial.

MAHONEY v. VAN WINKLE *et al.*

**OBJECTIONS TO FORM OF VERDICT MUST BE SPECIFIC.**—A general objection to the form of a verdict, without any specification of the particulars in which it is alleged to be defective, will not be considered.

**1 VALIDITY OF GRANT HOW SETTLED.**—A decree of the United States District Court, confirming a claim under a Mexican or Spanish grant, which has become final by the refusal of the Government to prosecute an appeal therefrom, and by stipulation of the District Attorney, settles forever the question of the validity of the grant.

**1 CONFIRMEE OF GRANT MAY MAINTAIN EJECTMENT.**—A confirree of a Mexican grant, after a decree confirming to him a specified quantity within exterior limits, fixed by the grant, embracing more than the quantity confirmed, may maintain, until an official segregation is made, ejectment, for any portion of the land embraced within the exterior limits against one in possession claiming to be a preemptor under the laws of the United States.

**1 SELECTION AND LOCATION UNDER MEXICAN GRANT.**—Where a Mexican grant cedes a tract of land known by a particular name and specifics, in pursuance of the grantee's petition, that a certain quantity is embraced within the limits of the tract, and also that any surplus above the specified quantity which, upon a survey and measurement by the Government, may be found within its boundaries, is reserved for the benefit of the nation; such grant vests in the grantee the right to the possession of the entire tract until by an official measurement and survey it has been determined that a surplus exists and the limits of the specific quantity granted are established.

**1 SEGREGATION OF LAND UNDER MEXICAN GRANT.**—The grantee cannot, in such case, himself make the measurement and segregation, but must await the action of the Government. He is therefore directly interested until the official segregation to protect the entire tract from waste and injury, and to improve it; and until then third persons cannot question his right to the possession of the whole.

**1 LAND EXEMPT FROM PREEMPTION.**—Until the official segregation of the specific quantity granted, the entire tract within the exterior boundaries of the grant is exempted from preemption and settlement by the legislation of Congress.

**SEGREGATION HOW EFFECTED UNDER MEXICAN LAW.**—Under the Mexican law the segregation was effected by delivery of juridical possession which could only be made after the approval of the concession by the Departmental Assembly, and was therefore often delayed for years, yet in California the grantee took possession at once upon the issuance of the grant, and his possession was respected both by the authorities of the Government and adjoining proprietors.

[553] **1 IDEM—EXTERIOR BOUNDARIES.**—\*Where a Mexican grant cedes a specified quantity within a larger area, a selection and location of the specific quantity may be made by the grantee under such circumstances, and accompanied with

<sup>1</sup> Confirmation and possession of Mexican grants, affirmed in *Carpentier v. Thirston*, 24 Cal. 280; *Thornton v. Mahoney*, 24 Cal. 578; *Love v. Shartzer*, 31 Id. 493; *Rich v. Maples*, 33 Cal. 108; *Mahoney v. Van Winkle*, 33 Id. 453; *Yates v. Smith*, 38 Cal. 66; 40 Cal. 670.

<sup>2</sup> As to boundaries and official segregation, approved in *Thornton v. Mahoney*, 24 Cal. 580. See *Minturn v. Brower*, 24 Cal. 669; *Emerio v. Penniman*, 26 Cal. 124; *De Arguello v. Greer*, 26 Cal. 627; *McGarrahan v. Maxwell*, 28 Cal. 95; *Seale v. Ford*, 29 Cal. 107; *Steinbach v. Moore*, 30 Cal. 507; *Stevenson v. Bennett*, 35 Cal. 431; *Bernal v. Lynch*, 36 Cal. 145; *Moore v. Massini*, 37 Cal. 435; *Banks v. Moreno*, 39 Cal. 236; *Mound C. L. and W. Assoc. v. Philip*, 64 Cal. 497. See 1 Wall. 373; 95 U. S. 36; 1 Sawy. 560.

<sup>3</sup> As to disclaimer, cited as authority in *Carpentier v. Thirston*, 24 Cal. 282; and see *Love v. Shartzer*, 31 Cal. 489.

such disclaimers, as to estop him from the assertion of any title or right to the possession of the remainder, existing within the exterior boundaries of the general tract, until by the action of the Government it is determined that his claim under the grant shall be satisfied by land elsewhere selected.

<sup>3</sup> **SELECTION BY GRANTEE HOW FAR CONCLUSIVE.**—There is nothing in the nature of a colonization grant prohibiting the grantee from restricting his general right to the possession of the entire tract. And when the grantee selects his location and quantity, uses it, leases it, sells or mortgages it, and disclaims title to the remainder, the selection is obligatory on him until the Government overrules his election and assigns him the land elsewhere.

**IDEM.—EFFECT OF DISCLAIMER.**—In an action of ejectment the plaintiff showed that the premises in controversy were part of a tract called Laguna de la Merced, which, in 1835, was granted by the Mexican Government to one Galindo upon a petition representing the tract to be a league in length and a half of a league in width more or less; that the grant reserved to the nation any surplus that might be found above this quantity; that Galindo and his successors in interest had possessed the entire tract, which embraced a surplus, until 1853; that they had obtained from the United States tribunals a decree confirming to them the land, to the extent of the quantity specified, to be selected within the boundaries of the general tract; that no official segregation had been made of this quantity by either Government, and that plaintiff was a purchaser from the confirmees. The defendants claimed that their possessions, though within the tract, were outside of a selection which they alleged had been made by plaintiff's grantors in such manner that they and he were estopped from claiming the balance. To show this defendants offered to prove that previous to June, 1853, the lands occupied by them had been "townshipped and sectionized" like other public lands of the United States; that in September, 1853, the grantors of the plaintiff caused a survey to be made of the specific quantity designated in the grant; that the claimants under the grant assented to such survey when made; that afterwards some of the grantors sold, mortgaged, and leased portions of the lands lying within the survey, and to the defendants and others publicly disclaimed having any title to or interest in the residue of the general tract; that acting under such disclaimers and acts of some of the said grantors they made their locations; and that they were not within the lines of the said survey. The Court, on objection of plaintiff, excluded this testimony, and on appeal: *Held*, that the evidence offered did not tend to prove an estoppel or a selection binding on the plaintiff, and was therefore properly excluded, three of the claimants (who were seven in number) being at the time infants, and two of them being under the disability of coverture.

**INFANTS AND MARRIED WOMEN NOT ESTOPPED.**—Infants and married women are incapable of giving any binding assent to a restriction of their rights to land claimed under a Mexican grant, or of making any disclaimers in respect to such rights which will bind them as an estoppel.

<sup>4</sup> **CO-TENANTS, RIGHTS OF.**—No action of a portion of several tenants in common can impair the rights of their co-tenants.

**SELECTIONS HOW MADE.**—\*No party but the Government can question any selection made by the grantee under his grant. As against all other parties it is sufficient for the grantee to show that the land selected lies within the boundaries designated in the grant. But to restrict the possessory right of the grantee to the selection made, the selection must be accompanied with such disclaimers as to the residue of the general tract as to operate as an estoppel upon him.

<sup>4</sup> As to rights of tenants in common, affirmed in *Carpentier v. Webster*, 27 Cal. 564; 33 Cal. 453. See *Carpentier v. Mendenhall*, 28 Cal. 485; *Sams v. Wilson*, 27 Id. 524; *Same v. Gardiner*, 29 Id. 162; *Same v. Mitchell*, Id. 333; *Tevis v. Hicks*, 38 Cal. 239; *Hart v. Robertson*, ante 348, note 2; *Lawrence v. Ballou*, 37 Cal. 518.

**OFFICIAL SURVEY.**—A survey made by the Surveyor-General of the United States for California to establish the location of a confirmed grant, under the Act of Congress of 1860, is of no binding force until it has become final in one of the modes pointed out by the act. Until then it is only a preliminary proceeding, not binding either upon the Government or the claimant.

**TENANT IN COMMON ENTITLED TO POSSESSION.**—A tenant in common of an undivided portion of a tract of land is entitled to the possession of the whole tract as against all persons, except his co-tenants, and as a consequence may, as against all others, maintain ejectment for the entire premises. *Touchard v. Crow*, 20 Cal. 150, affirmed on this point.

**TITLE UNDER MEXICAN GRANT.**—Per *NOBTON, J.*—That a Mexican grant, ceding a specific quantity of land within exterior boundaries embracing a larger quantity, conveys a title upon which an action of ejectment, for at least the quantity specified, may be maintained, has been several times decided by this Court, and must be considered as settled so far as the question depends upon the judgments of the State Courts. If before a juridical survey the grantee can recover any particular portion, he can recover the whole.

### APPEAL from the Twelfth Judicial District.

In 1835, José Antonio Galindo petitioned the proper Mexican authority for a concession of a tract of land called the “Laguna de la Merced,” situated within the limits of the present counties of San Francisco and San Mateo. In his petition he stated that the tract solicited was a league in length and half a league in width, more or less, and referred to an accompanying map as showing the boundaries. After a compliance with the required forms, a grant was issued to him containing the usual conditions of grants in colonization and reciting that “The land of which mention is made is a league in length by half a league in width, and is equal to one-half a league square as shown by the map, attached to the *espediente*. The Judge who may give the possession will cause the same to be measured in accordance with the ordinance, the surplus (*sobrante*) which may result to remain to the use of the nation.”

Galindo immediately entered into possession, and soon after built a house and corral near the southern line, which he occupied for a year or two, and then sold and conveyed his title to Francisco de Haro. De Haro then moved his [555] family into the house built by \*Galindo, and also built another house near the same spot, which he occupied for a time; after which he built another house, farther towards the north, at the south-eastern extremity of Lake Merced, into which he moved his family, and there continued

to reside until his death, which occurred in 1848 or 1849; his cattle in the meantime straying over the ranch for pasturage. De Haro died intestate, and his estate descended to his seven children, only two of whom were adults.

In 1852 a petition was presented in the name of the heirs, to the Land Commission, for a confirmation of the title, which by the decree of that body, and afterwards on appeal by the United States District Court, was confirmed. The decree of the latter tribunal became final by the refusal of the Government to prosecute an appeal therefrom, and by the stipulation of the District Attorney.

This decree declared that the land confirmed was known as the Laguna de la Merced, and was "of the extent of one-half a square league, being one league from north to south, and a half league from east to west, to be located according to and within the calls of the original grant." No partition of the premises was ever made between the heirs of De Haro.

The plaintiff, Mahoney, at different times between 1858 and 1861, and before the commencement of this action, purchased from five of the heirs their undivided interests, and relies upon the title thus acquired. The action is ejectment, and the defendants, twenty-one in number, answered separately; some of them simply denying the allegations of the complaint, and others, in addition to this denial, setting up title in themselves to specific parcels of the premises as preëmptioners under the laws of the United States, and each of them demanded a separate verdict.

On the trial, the plaintiff having rested on proof of the facts substantially as above stated, the defendants, for the purpose of showing title in themselves, and that the plaintiff was estopped from claiming the land occupied by them within the Laguna de la Merced, made an offer of proof which is stated in the record as follows: "Defendants then offered in evidence a certified copy of map from the Surveyor-General's Office of the State of California with field

\*notes, dated twenty-ninth of June, Anno Domini [556] one thousand eight hundred and fifty-three, showing that before that time, the land of the various defendants claiming title under the United States, as set out in their answers and stipulation, had been by the United States town-

*shipped and sectionized* like other public domain of the United States. Also, in connection therewith, the various preemption claims, bounty, school, and seminary land warrants with proof of location and improvements as set out in the various answers of the defendants, and proposed to follow up said offer by proof that the grantors of the present plaintiff, and through whom he claims, did, on the twenty-second day of September, Anno Domini one thousand eight hundred and fifty-three, have made and completed a survey of the half league square within the exterior boundaries contended for by plaintiff, and proposed to follow it up with proof of the assent of claimants upon its being made according to that survey, and that none of these defendants nor their claims are within the lines of that survey, and that since said survey had been so made and completed, *some* of the grantors aforesaid of this plaintiff have, within the lines of said survey, sold portions thereof to third persons, mortgaged other portions and leased other portions thereof, and that they have constantly and publicly to these defendants and others, before these defendants made their locations, disclaimed having any title or interest in the balance of the land lying within the boundaries of the rancho claimed by plaintiff. And acting under such disclaimers and acts of *some* of the grantors of the present plaintiff and the United States, these defendants made the locations aforesaid, and have since made large and valuable improvements upon said lands. And also offered to prove by competent proof that under the final decree of confirmation of this grant, as introduced by plaintiff, the Surveyor-General of the State of California did truly and legally make the survey of this grant, and did plat the same, and did on the eighteenth day of June, Anno Domini one thousand eight hundred and fifty-nine, examine and approve of the same, and the same was on that day filed in his office as the final survey of said rancho. A certified copy of said survey with map and field notes was also offered in evidence. And that [557] afterwards and before the commencement of *\*this* suit, said survey was ordered into the United States District Court for the Northern District of California for revision under the Act of Congress relative to surveys of Mexican Land Grants of California, approved fourteenth of

June, one thousand eight hundred and sixty, under the exceptions and objections of the United States District Attorney and those of the defendants, included within the lines of said survey, but not by plaintiff, and is there now so pending; that the plaintiff has appeared in said proceedings to defend said location, and that the possession and locations of the balance of these defendants are entirely without the bounds of said last named survey." *In connection with this offer, it was conceded that at the time of the making of the survey in 1853, three of the heirs were minors and two others of them were femme coverts.*

To the proof offered the plaintiff objected, on the ground that it was irrelevant and constituted no defense. The Court sustained the objection, and defendants excepted. The Court instructed the jury to find generally a verdict in favor of two of the defendants, and "a separate verdict against each of the other defendants for the land described in the complaint, without specifying the particular description of the land" of which each defendant was in possession. The verdict rendered contained the names of all the defendants arranged in a column, and opposite two of them, connected by brackets, was written "for defendants," and opposite fourteen others, also connected by brackets, the words "for plaintiff for land as described," and opposite the other five "for plaintiff," and at the bottom the words: "We, the jury in the case of *Mahoney v. Van Winkle et al.*, find a verdict as above." The minutes of the Court, immediately after stating the rendition of this verdict, contain an entry as follows: "Whereupon defendants by their counsel excepted to the form of the verdict."

Judgment was rendered in accordance with the verdict. Defendants moved for a new trial, which was denied, and from this order and the judgment the appeal is taken.

*J. B. Crockett*, for Appellants.

I. The judgment and verdict are erroneous. The defendants \*were entitled to separate verdicts, and to [558] a separate judgment, in respect to each defendant. This is not a mere matter of form, but affects a substantial right. If separate verdicts had been rendered, and separate judgments entered, each defendant would have been severally

liable for his own portion of the costs, and for rents and profits pending this appeal, of the particular portion of the land held by him. (*Greer v. Mezes*, 24 How. 268.)

II. Upon the facts proved, or admitted, the plaintiff was not entitled to recover in ejectment. The cases of *Cornwall v. Culver*, 16 Cal. 423, and *Riley v. Hirsch*, 18 Id. 108, are those chiefly relied on by the respondent. But neither of them sustains the respondent's theory; on the contrary, the latter case is directly hostile to his position. It is claimed by respondent's counsel, on the authority of these and other prior decisions, that under a concession made by the Mexican Government of a smaller quantity within a larger area, without a judicial measurement, and without any proof of actual possession of the land in contest by the grantee, he can maintain ejectment by force of the concession alone against trespassers for all the land within the exterior limits. This Court has never so decided, nor does the point arise in this case. The question here is whether the claimants, after making the "temporary selection and location," referred to by this Court in the case of *Riley v. Hirsch*, and after dealing with it as if in full property, by leasing, selling, and mortgaging it, and after disclaiming title to the remainder of the tract, can maintain ejectment against those who, under these circumstances, have in good faith purchased from the Government, and paid for the land they occupy, outside of the half league selected by the claimants. Whatever they may have claimed, and whatever acts of ownership may have been exercised over the general tract by Galindo or de Haro, it is evident that after the survey in 1853 the heirs claimed and exercised ownership over the half league only, and abandoned whatever right of possession they had as to the remainder, confining themselves to the half league alone.

The case of *Riley v. Hirsch* in its reasoning covers this case. In that case the Court lays particular stress upon the right of the grantee to make his temporary selection. It says: [559] "It was com-\*petent for the grantee himself to make a temporary selection and location, which would be binding and effectual as against intruders, and trespassers, and all parties, until the action of the Government in the matter." \* \* \* "Such temporary selection and location are



evidenced by occupation or cultivation of the land, its sale or lease, or any ordinary use by the grantee, according to the custom of the country." The Court considered the evidence in that case sufficient to establish the "temporary selection and location" of Sutter, and manifestly decided the case on that ground. But the Court did not assert, and I think did not intend to intimate, that after making his "temporary selection and location," he could have maintained ejectment for all the land outside of it. But in this case this is precisely the principle asserted by the District Judge, in whose opinion the temporary selection and location went for nothing, and in no degree impaired the plaintiff's right of recovery for the entire tract. The ruling of the District Judge covers the broad ground that, notwithstanding the temporary selection of the grantee, his use of the land selected, his sale, leasing, and mortgaging of it, and his disclaimer of possession and title as to the remainder, he may nevertheless recover all the remainder of the land by virtue of the grant alone. I deny that such recovery could have been had if there had been no selection; but when the grantee selects his location and quantity, uses it, leases it, sells or mortgages it, and disclaims title to the remainder, it is and ought to be obligatory on him until the Government overrules his election, and assigns him the land elsewhere. By this rule no hardship is imposed upon the grantee. He selects the quantity he is entitled to, and is protected in the enjoyment of it, pending his proceedings to perfect the title; and if the Government repudiates his selection, and assigns him other lands, his title attaches to the new location. In this way exact justice is done to all. The grantee gets all the grant entitles him to, and settlers outside of his location are not disturbed, unless the Government, in the exercise of its sovereign right to segregate the lands of the grantee from the public domain, shall include their possessions in the tract finally awarded to the grantee, in which event their rights must of course yield to his. But on the plaintiff's theory, if the grantee makes his selection, \*enjoys it, leases and sells it, he may eject [560] all settlers from the general tract, not only before a survey, but even after an official, approved survey, pending in the District Court for review, not excepted to by the claim-

ants, and which does not include a large number of the settlers sought to be ejected.

III. The plaintiff is precluded by the official survey, and can claim no lands outside of it, unless it is set aside by the District Court, and a new survey ordered. Before this suit was brought, there had been an official survey of the half league approved by the Surveyor-General. This survey embraces a portion but not all the defendants. It had been ordered into the District Court at the instance of the District Attorney, acting on behalf of the United States and of these defendants. Exceptions to the survey were filed by the District Attorney, in pursuance of the Act of Congress of the fourteenth of June, 1860, and is still pending on these exceptions; but no exceptions were filed by the claimants, and the time has long since elapsed within which such exceptions could be filed. So far from excepting, the claimants are insisting on the survey as correct. This fact appears in the case. It is obvious, therefore, as the case now stands, that this official survey is obligatory on the plaintiff, and concludes his rights until it is set aside. He cannot be heard to impeach it, because, as to him, it has become final by operation of law. So long as the survey stands, he is under a bar which precludes him from asserting title to lands outside of it. As to him, it is a final adjudication of his rights, unless the Court sets it aside. If the District Attorney sees fit, he may at any time withdraw his exceptions, and the survey will then become absolutely final. As far as relates to the plaintiff, it is final and obligatory now, because he cannot impeach it or gainsay it. So long as this bar continues, he is estopped to claim any land outside of it. It binds him as completely as a patent would do, so long as it remains in force. If the patent had issued, and the Government had instituted proceedings to vacate it, no one will claim that during these proceedings the patentee could treat the patent as a nullity, and sue in ejectment on his original grant for lands outside the patent. The patent limits his claim and defines it. An approved official survey has precisely the same effect [561] after the time has \*expired within which the claimant could except to it. Henceforth it limits and defines his claim until it is set aside; and the proceedings in the

District Court for reviewing the survey have no greater effect upon the claimant's rights in extending his claim than proceedings to vacate a patent. But whilst the claimant is bound by the survey until set aside, it has no such conclusive effect as against the Government, or persons claiming under it, pending their exceptions to it. As to them it is not binding until finally approved. But the claimants, having failed to except to it, are bound by it until set aside.

IV. The defendants are not mere intruders without color of title. Their lands were sectionized as public lands, and the defendants have purchased them from the Government, and paid for them. The Government officers and the defendants have been induced by the conduct of the claimants to treat these lands as part of the public domain.

The sixth section of the Act of Congress of March 3d, 1853, providing for the survey of the public lands in this State, authorizes preëmption claims to be located upon any of the public lands, whether surveyed or unsurveyed, with certain exceptions, amongst which are lands "claimed under any foreign grant or title." I contend that under this act all lands were *prima facie* liable to preëmption, except those in respect to which the claim of title, founded on a "foreign grant," was evidenced by the usual and ordinary acts of possession and ownership. If the grantee did not see fit to reduce his lands to possession, or to exercise over them the ordinary acts of ownership, whereby the public might know what lands he "claimed," he exposed himself to the peril of having his lands preëmpted, in which event he could only recover the possession after his claim was finally confirmed and located by a survey. The whole question resolves itself into a proper interpretation of the word "claimed," in the Act of March 3d, 1853. Does it mean simply to embrace all lands within the exterior limits of any grant, or does it mean only those lands which the grantee, under the law, is in fact entitled to, and his "claim" to which—prior to the final location—is evidenced by possession, or other usual acts of ownership? I think the latter is the proper interpretation, in view of the condition of these titles at the [562] date of the act referred to.

The grantees in this case selected their half league, reduced

it to possession, leased, mortgaged, and sold portions of it, and have not been disturbed in the enjoyment of it. The defendants took up preëmption claims on the remainder of the tract, and are in possession under them. There has been no final survey of the grant. Are the preëmption claims absolute nullities, and void *ab initio*, or are they only voidable on condition that they are included in the final survey of the grant? It is plain to my mind that they are voidable only, and until the contingency happens they constitute a valid defense to this action. The defendants are not trespassers without title; on the contrary, they have a defeasible title, liable to be defeated on one condition only, to wit: that the lands are embraced in the final survey. This contingency has not yet happened, and until it does they are entitled to the possession.

V. We also claim that Mahoney, as a tenant in common with a portion of the heirs of De Haro, cannot maintain ejectment for the whole tract. (9 Dana, 427; 10 Iredell, 446; 4 Burr, 2437; 6 East. 173; 11 Id. 288; 12 Id. 39; 3 Taunt. 120.)

*Walter A. Tompkins and Sol. A. Sharp, for Respondent.*

I. Admitting, for the sake of the argument, that the verdict is erroneous, it ought not to be set aside, for the reason that there was no legal objection to it at the time of its rendition. It is true there was an objection to the form of the verdict. This is too general; it should have been specific, showing in what respect the form of the verdict is wrong. But the verdict is not erroneous. (*Perkins v. Wilson*, 3 Cal. 137; *Moody v. McDonald*, 4 Id. 297; *Little v. Larraber*, 2 Greenleaf, 37; *Burhaus v. Tibbits*, 7 How. Pr. 27.)

II. Appellants contend that there was a right of preëmption within the exterior boundaries of a Spanish or Mexican grant; that is to say, when there was a grant of a smaller quantity within a larger one, which right was subject to be defeated by the approved survey and patent.

It is provided in the thirteenth section of the Act [563] of April, 1851, \*among other provisions, "That all lands, the claims to which have been finally rejected by the Commissioners, shall be deemed held and considered

as part of the public domain of the United States." This section shows that the word "claims" embraced all claims of lands presented to the Commissioners, whether valid or invalid. Until the claim was rejected the land did not become public, and therefore was not subject to preemption.

In the Act of 1853, referred to by the counsel, reserving these lands from preemption, the word "claimed" has the same meaning, viz.: those lands claimed, by presenting the same to the Commissioners. Congress no doubt intended to withdraw all of the lands claimed under foreign grants, from controversy. This is the plain letter of the law. But further than this, the whole extent of land within the exterior boundaries was claimed by possession; and, being thus claimed, is excepted from the operation of the preemption laws of the United States and of this State.

It is conceded that this land was held in actual occupancy by the grantee and De Haro, for fourteen years. This is certainly a sufficient claim, if all others failed; and though he actually lived on and occupied but a part of it, his flocks and herds pastured over the whole. The language of this Court in *Cornwall v. Culver*, 16 Cal. 413, is as follows: "Thus far, the United States have given no countenance to any intrusion upon this land; but, on the contrary, have expressly forbidden the assertion of any preemption rights to it or to any lands similarly situated." (See, also, upon same question, *Riley v. Hirsch*, 18 Cal. 198-200; *Moore v. Wilkinson*, 13 Id. 489; *Biddle Boggs v. Merced Mining Co.*, 14 Id. 361-2.) We submit that this land within the exterior boundaries is exempt from preemption, and therefore these parties can have no equities in the premises.

The simple question, then, is: Can these parties make a selection which will bind them, in favor of parties who are trespassers, without title or shadow of title? If a selection were possible, the acts of Galindo, as evidenced by his use, occupation, and sale of the land whilst the owner, was a selection, to all intents and purposes, of the half league of land (if confined to that quantity) including his improvements. If Galindo, having the right to make \*a selection, did [564] make a selection, would not the right of selection once exercised, cease? and would not his selection, if binding on

him, be equally so on his grantees, and all who are privy to his title? We think, unquestionably; because, if selection has any basis in the law, it is upon the principle of estoppel; and an estoppel of this nature, affecting the title to land, would run with the land, and bind all parties and privies to the title. De Haro would have taken nothing by his conveyance from Galindo except the half league of land so selected, nor would any other portion have passed to his heirs or to the present plaintiff. Counsel for appellants uses the phrase "temporary selection." We inquire, how temporary? Is it certain or uncertain, as to time? Can the party making the selection, or his successors in interest, change it? If so, when, how often, and under what circumstances? How is this right of selection limited?

We submit the only rational answer to these interrogatories is, that no selection could ever be made until a final segregation of the private from the public land, either by a judicial measurement under the Mexican system, or a final survey under our Government; and when once made, cannot be changed, and is lasting as the landmarks of the country.

III. As to the alleged selection by the heirs in 1853. Francisco de Haro died in 1848 or 1849, leaving seven children. It is conceded that at the time of the survey of Ransom and the alleged selection by the heirs, three of them were minors under age, and the record shows that one is still a minor; two were and still are married women. Ramon De Zaldo, it appears, acted then as administrator of De Haro's estate, and was guardian of two of the minors.

The offer of proof respecting a selection by plaintiff's grantors, in 1853, was properly ruled out: 1st. No selection could have been made to bind any of the heirs laboring under disability; no act of the husband could bind as a selection the separate property of the wife, and no act of the guardian could bind as a selection the property of the minors. 2d. De Haro died during the operation of the civil law whereby the

descent was cast without administration, and the property vested immediately in his heirs. \*3d. De

[565] Haro's death having occurred prior to the passage of our Statute of Probate, his estate was not subject to administration, and De Zaldo's acts as administrator were and are

void and unauthorized. 4th. The offer only extends to "some of the heirs," and it does not appear how many, or which—whether adults, minors, or married women. It does appear, however, that the only male adult, and the one who should have been consulted, had nothing to do with the selection.

The case of *Riley v. Hirsch* is cited to sustain this doctrine of temporary selection. We do not understand that case as deciding any such question. It is stated in that opinion of the Court that "it was competent for the grantee himself to make a temporary selection and location which would be binding and effectual as against intruders and trespassers and all parties until the action of the Government in the matter. \* \* \* Such temporary selection and location are evidenced by occupation or cultivation of the land, its sale or lease, or any ordinary use by the grantee according to the custom of the country." What would be "binding and effectual as against intruders and trespassers," is a matter widely different from that which would be binding and effectual in favor of intruders and trespassers. The one party has title; the other party has no title, or color of title. The party having no right, cannot bind the party having the right.

These grantees and the United States were, at the time of this pretended temporary selection, and still continue, the only parties in interest within the exterior boundaries of this grant. The grantees have a vested interest in the specific quantity granted and the right to the possession of the whole tract until after the segregation. The United States are the owners of the overplus, which is to be determined by the segregation. The grantees have no power to make the segregation. This is the sole province of the United States. The segregation is a permanent selection. Admitting, for the sake of argument, that the grantees have equal authority with the United States to make a temporary selection, the United States is a necessary party to the selection, for the reason that the United States is the only party in interest, the only party that could be affected by the selection, and the only party that could bind or \*be bound by the [566] grantees. Estoppel is the only principle of law we can conceive upon which the counsel can base this question

of temporary selection, and it is clear that this case is wanting in all the essential elements of estoppel.

In relation to the suggestion of abandonment by the grantees of all outside of the pretended temporary selection, this Court has decided that the doctrine of abandonment of real estate only applies where there has been a mere naked possession without title. (*Ferris v. Coover*, 10 Cal.)

IV. Another point made is, that the official survey is final as to us. This survey was made by the Surveyor-General, in accordance with the law of 1851, subsequent, of course, to the confirmation. It is stipulated as a fact that the survey is not final. It is undetermined, and undergoing judicial investigation in the United States District Court, but it is claimed that it is final as to us, because we have filed no exceptions. It has been decided in all the cases in which the question has arisen in this Court, that the claimant has no power over the survey. It belongs exclusively to the Government. Prior to the Fossat decision, the Courts of this State uniformly held that an approved survey by the United States Surveyor-General was final, and equivalent to a patent. I suppose the reason of these decisions was, that it was uniformly the practice of the Federal authorities to issue a patent upon an approved survey. Since that decision, this Court has gracefully yielded to the doctrine therein promulgated, viz.: that the District Court did not lose jurisdiction of the case until the issuance of the patent. The law of June, 1860, was passed carrying out the Fossat decision, or, in other words, prescribing a mode for the adjudication of the surveys.

The subject matter in the proceeding prescribed by this statute is the survey. The decree of the Court approving of the survey is the final adjustment of the matter. There is no final disposition until the decree. This is the only mode known to the law. It is the final decree that affects all parties. The decree is the judgment of the Court upon the matter before it, and until that decree there is nothing adjudicated, nothing determined or settled as final or binding upon any party.

V. We do not deem it necessary to discuss the [567] question of ten-\*ancy in common raised by the counsel for the appellants. It has recently received the con-



struction of this Court, and we think it is not an open question in this State. (*Touchard v. Crow*, 20 Cal. 150.)

*Wm. M. Pierson*, also, for Respondent.

I. The facts offered to be proved by defendants, it is pretended, constitute such a temporary "selection and location" as will, if the theory of the conclusiveness of such selection and location be based on reason, restrict us to the precise boundaries of the survey made in 1853. Do they establish such a selection? This Court has defined the evidences that may indicate a temporary selection and location; and what are they?—"Occupation and cultivation of the land, its sale or lease, or any ordinary use by the grantee, according to the custom of the country." These acts, if confined to a specific tract, and exclusively to that tract, may establish such a selection and location of that tract as will confine the grantee to it until the interposition of the Government by a finally approved survey. But the very core of the definition presupposes that these acts are restricted to the particular tract, and that they do not apply to the surplus land within the exterior boundaries. The facts in the case at bar fall below the spirit of the definition.

It is further asserted, however, that some of the adult heirs and the guardians of some of the minors, leased, sold, and mortgaged a valuable portion of the lands embraced in the survey of 1853. If we are to be bound by a supposed selection and location, the primal elements of justice imperatively demand that that selection and location should be the act of all the parties interested. No number of tenants in common less than all can perform any act in relation to the cardinal rights of property that can injuriously affect the interests of the remainder. In the case at bar it is asserted that some of the parties interested sold, leased, and mortgaged a portion of the lands within the Ransom survey, and because those "some" chose to abandon, as counsel assert, their claim to property, the plaintiff, who is grantee of the "some" who did not so choose, as well as the grantee of the others, is silenced in the assertion of his rights to the unrelinquished residue.

But grant that all the parties interested united in those

[568] sales, \*leases, and mortgages, what conclusion follows? Had they not the indubitable right to sell, lease, and mortgage any portion, or the whole of the tract? Because they sold, leased, and mortgaged land inside of the survey of 1853, did that *per se* operate as a restriction against performing those identical acts as to land outside the survey? And further, the offer of proof does not show that the parties who thus sold, leased, and mortgaged within the survey did not also sell, lease, and mortgage outside the survey. The selection, then, is neither shown to be exclusive in its character, acquiesced in by all the parties in interest, or consisting of those emphatic acts which the spirit of the definition of this Court unequivocally requires.

II. Admitting for argument sake, however, that the parties interested have made a temporary selection and location of their specific half league, and that the same comprised all the elements of fact that could be essential to the perfect application of the principle, still that selection and location are not conclusive on the grantee to the extent that he is debarred from recovering in ejectment lands located outside of it, but within the exterior boundaries, until the action of the Federal Government in segregating his specific quantity from the public lands. It cannot be necessary to insert in this place extracts from the opinions of this Court wherein the grantee of a specific quantity of land to be located within defined exterior boundaries of a larger area is declared to possess the right of property to the entire tract within the exterior boundaries, and capable of enforcing that right in an action of ejectment until the proper authority, the Government of the United States, officially segregates the specific quantity by a finally approved survey. A mere citation of authorities will be sufficient. (*Vanderslice v. Hanks*, 3 Cal. 27, 47; *Gunn v. Bates*, 6 Id. 263, 272; *Ferris v. Coover*, 10 Id. 589; *Manson v. Koppikus*, 11 Id. 89; *Waterman v. Smith*, 13 Id. 373, 419; *Biddle Boggs v. Merced Mining Co.*, 14 Id. 279; *Morton v. Folger*, 15 Id. 276; *Cornwall v. Culver*, 16 Id. 423; *Teschmacher v. Thompson*, 18 Id. 27; *Riley v. Hirsch*, Id. 200, 201; and in the United States Supreme Court, *Fremont v. United States*, 18 How. 542.),

This right of property, this vested title, has not been

alienated \*by any of the modes prescribed at com- [569]  
mon law or by statutory regulations concerning con-  
veyances, neither has it been divested by any proceeding  
in a Court of law. And yet it is asserted that the right of  
property is extinct, or at least not in a condition to be en-  
forced. On what ground is this based? There can be but  
one, that of estoppel. In no other way than on this venerable  
principle can a party be debarred from asserting his vested  
rights to property.

The doctrine of estoppel is defined in clear and concise  
language by Chief Justice Field in the recent case of *Biddle  
Boggs v. The Merced Mining Co.*, 14 Cal. 367, in the following  
words: "It is undoubtedly true that a party will, in many in-  
stances, be concluded by his declarations or conduct which  
have influenced the conduct of another to his injury. The  
party is said in such case to be estopped from denying the  
truth of his admissions. But to the application of this prin-  
ciple with respect to the title of property it must appear—  
1st, that the party making the admission by his declarations  
or conduct, was apprised of the true state of his own title;  
2d, that he made the admission with the express intention to  
deceive, or with such careless and culpable negligence as to  
amount to constructive fraud; 3d, that the other party was  
not only destitute of all knowledge of the true state of the  
title, but of the means of acquiring such knowledge; and 4th,  
that he relied directly upon such admission, and will be in-  
jured by allowing its truth to be disproved, \* \* \* and  
these things must appear affirmatively."

In what manner do the facts of this case correspond with  
those necessary to constitute an estoppel under the foregoing  
definition? Is it attempted to be shown that the heirs made  
the asserted selection deliberately and with full knowledge  
that the consequences of such an act would inevitably be the  
contraction of their lines from the league and a half selected  
by their ancestor to the half league selected by themselves?

Is it not apparent, rather, that they acted in this survey of  
1853 in ignorance of their legal rights—in obscurity as to the  
perfection of their title to the entire external limits of the  
grant, by thus pursuing a course of procedure that would  
divest them of the right of possession to thousands of acres

of land, and confine their property to the barren desert of sand included in that survey?

[570] \*It would require the most pointed "affirmative" proof to establish such a state of facts as would indicate a full appraisal by the heirs of the exact character of their title, before their action could be converted into an estoppel. Such proof, or the offer of such proof, is lacking in the record.

Again, were these acts of the heirs performed with the express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud; or were the appellants destitute of all knowledge of the true state of the title, and also of the means of acquiring such knowledge?

There can be no estoppel against the law. (*Fantille v. Gilbert*, 1 Term, 171; *Jones v. Sasser*, 1 Dev. & Bat. 457.) The appellants are charged with the knowledge of the law. (*Moore v. Wilkinson*, 13 Cal. 489; *Ran v. Pope*, 2 Vern. 239; 1 Dev. & Bat. 452, 465; *Adams' Eq.* 374; 1 Sto. Eq. Jur. 391-393.) What was the law with the knowledge of which they are chargeable? 1st, that the Act of Congress of March 3d, 1853, sec. 6, recognized the land to the exterior boundaries of the grant in this case as private domain, until the official segregation by the Government of the specific tract; that it prohibited the grantee from making any selection for himself, by reserving to the Government the exclusive right to survey and segregate; that since no power of location or selection was bestowed upon the grantee, the entire tract within the exterior boundaries was private property, and a selection by the grantee was simply void, as against the Government, and necessarily equally void as to those claiming to hold from the Government.

The appellants, however, are chargeable with additional knowledge of the law, which is equally as conclusive as the knowledge that the land was private domain throughout its entire extent. They were apprised by the Act of Congress of March 3d, 1851, sec. 13, that lands held under Mexican grants can only be surveyed after confirmation; and by the Act of March 3d, 1853, sec. 3, that the Surveyor-General has no power whatever to survey any lands claimed under a Mexican grant, until after confirmation. They were further

apprised by the well settled principles of law, that an officer acting beyond his powers, is possessed of no greater authority than a private individual; and, consequently, that the survey of \*1853 was of no greater effect than a private [571] survey. They were further apprised, by an extensive train of decisions, that a private survey binds no one. (*Biddle Boggs v. Merced Mining Co.*, 14 Cal. 67-371; *Waterman v. Smith*, 13 Id. 416; *United States v. Hanson*, 16 Pet. 199; *United States v. King*, 3 How. 785; *Le Bois v. Brannell*, 4 Id. 457; *Mackay v. Dillon*, Id. 447; *Glenn v. United States*, 13 Id. 256; *Moore v. Wilkinson*, 13 Cal. 488; *Ferris v. Coover*, 10 Id. 631; *Rose v. Davis*, 11 Id. 133, 141; *Blake v. Dougherty*, 5 Wheat. 364.) And, further, that occupation and cultivation can have no greater effect than a private survey. (*Waterman v. Smith*, 13 Cal. 416, and authorities cited. See also the Act of Congress relating to surveys in Louisiana, 2 Stat. at Large, 353, wherein initiatory surveys for presentation to the Land Commissioners are declared to be mere private surveys.)

As to the remaining element necessary to constitute an estoppel, viz., that the appellants relied directly upon such admission, and will be injured by allowing its truth to be disproved, it will suffice to remark that the offer of proof is silent upon the subject; and it is left to inference to gather whether they did or did not rely directly on such admission.

*Tully R. Wise*, for Appellants, in reply.

I. One tenant in common cannot recover more than his undivided share in an action of ejectment.

*Denn v. Purvis et al.*, 1 Burr, 326, was a case where a tenant in common declared for an undivided half. She was entitled to an undivided third. Lord Mansfield said: "This is an exceeding plain case. The rule is undoubtedly right, 'that the plaintiff must recover according to the title.' Here she has demanded half, and she appears entitled to a third, and so much she ought to recover."

In *Cretzer's Lessee v. Thomas*, 1 Har. & J. 463, the declaration was for the whole land, and the deed showed title for an undivided moiety of the land in question. The verdict and judgment were for an undivided moiety.

Afterwards, the Maryland Courts held that, when there was

a declaration for a tract of land, you might recover [572] the whole or a \*part of it, but could not recover an undivided part of the whole tract. (*Benson v. Musseter*, 7 Har. & Johns. 212.)

In *McFadden et al. v. Haley*, 2 Bay. 457, and in *Perry v. Middleton*, Id. 539, the South Carolina Courts expressly say that a person can recover a part where the whole is sued for.

In *Roe v. Rowleston*, 2 Taunt. 441, it is laid down as a rule that one parcener may be barred by the Statute of Limitations, while the other may recover his undivided part.

In *Doe v. Barksdale*, 2 Brock. 439, Chief Justice Marshall cited and approved of the last case. He said (p. 445): "In reason, then, it would seem that each coparcener might recover his separate interest." And in this case the plaintiff recovered six-sevenths of the land.

In *Doe v. King*, 5 Eng. L. & E. 517, it was distinctly and emphatically laid down that in ejectment plaintiff can recover only what he owns. This is a very important case.

In *Larue's Heirs v. Slack et al.*, 4 Bibb, 358, there was a declaration for the whole. The proof showed the plaintiff entitled to an undivided part. The Court said: "In such a case, the plaintiff cannot recover the whole in severalty, but his recovery should be according to the extent of the title shown to be in the lessors."

In *Allen v. Trimble*, 4 Bibb, 21, the Court held as they did in the case last above cited.

In *Craig v. McBride*, 9 Dana, 427, the Court said that the plaintiff could only recover the share to which he showed himself entitled. (See also *Den v. Wannell*, 10 Ire. 446, *Godfrey v. Cartwright*, 4 Dev. 487; Arch. Forms, 380; *Lewer v. South*, 9 Ire. 237; *McArthur v. Porter*, 6 Pet. 205.)

We think the foregoing authorities establish these principles: 1. That in an action of ejectment the plaintiff can only recover upon the strength of his own title, and cannot found his claim on the weakness of his adversary's claim. 2. That the defendant may prevent the recovery of plaintiff by showing a title in himself, or by showing a clear subsisting title in a stranger. 3. Possession is presumptive evidence of right, and the defendant cannot be deprived of his possession by any person but the rightful owner of

\*the land—that is, he who hath the *jus possessionis*. [573]

4. That a clear subsisting outstanding title in another means such a title as the stranger could recover on in an action of ejectment. 5. That one tenant in common may be barred by the Statute of Limitations while the statute does not run against his co-tenant. 6. That where a person is owner of an undivided portion he can only recover such undivided portion, whether he sues his co-tenant or a stranger.

When this case was before the Court, we were pointed to the case of *Touchard v. Crow*, 20 Cal. 150, in which the question now before your Honors arose. That case is not discussed upon principle. It is decided upon the strength of *Stark v. Barrett*, 15 Cal. 731. This last case is not discussed upon principle, and no authority is referred to. On the other hand, in the case of *Clark v. Huber*, 20 Cal. 196, the Court held that, in an action of ejectment, the plaintiff could only recover the half of the damages. This was admitted by the counsel who argued the case. Is there not an inconsistency in this? Can a man be entitled to the whole of a thing, and only half damages for the withholding of that thing?

In the case of *Welch v. Sullivan*, 8 Cal. 187, this Court held, before the passage of our Statute of 1857, that tenants in common could not sue together—that is, they had no such joint interest as enabled them to bring suit together. Now, as the action of ejectment might be brought upon mere prior possession, or upon title, how is it that they could not sue together to recover their joint possession, if it is true that the possession of one is the possession of the other? Joint tenants, having a unity of everything, must sue together. And if it were true that the possession of one tenant in common is the possession of the other, in the sense contended for, it would follow that they must sue together when they rely upon prior possession alone.

II. The counsel for the respondent say we can have no standing in Court, because we cannot be preëmptioners, for the reason that the law of Congress prohibited us from taking any preëmption claim on land claimed by a Spanish grant. By the Act of 1841, only surveyed public lands could be preëmpted. California being an exceedingly large State, and her population being scattered all \*over [574]

the State, Congress, for the benefit of settlers, deemed it expedient to extend the preemption privilege by the Act of 1853 (U. S. Statutes at Large, vol. 10, sec. 6, p. 246) to unsurveyed lands. As long as preemption rights could only be acquired on surveyed lands the Government could protect Spanish grants by refusing to survey the adjoining lands until such grant was confirmed and surveyed. And this was absolutely necessary, for the reason that many of the Spanish claims were at best mere equities, and would have been divested by subsequent legal titles, acquired before the equity was perfected into a legal title. But when the Government determined to extend the preemption laws to unsurveyed public lands as well as surveyed, it was necessary to protect those equities acquired under the Mexican Government, hence the proviso. It only meant to protect Spanish grants by giving them the preference; but, saving their rights, the preemption is perfectly good. If this were not so, then these lands never can be preempted, until Congress chooses to pass a law making them so, even after the survey.

This construction certainly would change the whole meaning of the Acts of 1841 and 1853; for the Act of 1841 extended to all public lands which were surveyed, and the Act of 1853 was meant to extend the law of 1841 to unsurveyed as well as surveyed public lands. The Act of 1853 was not intended to alter the Act of 1841 in any particular. This law of 1853 did not mean any claim that any person thought proper to make to any land in the State, for otherwise any person could have defeated all preemption claims by claiming the whole State, and such lands as were claimed by grants which were never presented would not be liable to preemption. Congress never meant this. They meant to say that in respect to such lands as were finally confirmed and surveyed, the preemption right should not affect the Spanish grant.

III. A Mexican grant without juridical possession is not such a title as will sustain ejectment.

It is useless in this case to argue this *in extenso*. It is sufficient to make a few general observations. First, every grant provided that the grantee should get from the municipal authority juridical possession. When he got juridical [575] possession he had such a title \*as he could recover



upon; but until then he only had an equity, which could lead to the possession, but this was by an official act. This is directly said by the Supreme Court of the United States in Fremont's case, 17 How. Here they recognized the fact that preëmptors might get a better right than Fremont by locating their claims first. Until location he has a right to a specific quantity; after location, he has a right to the specific land itself.

Could Fremont recover in an action of ejectment seventy or eighty leagues of land when he was only entitled to eleven? Can Mahoney recover a league and a half of land when he is only entitled to a half league?

IV. The Surveyor-General is an officer appointed by the Government, whose acts are just as conclusive as are the decisions of the District Court, unless they are reversed. Under the Act of 1860 he made a survey of Mahoney's land. That is a decision, and is the law of the case until it is reversed. The United States District Court alone can reverse it. And if the District Court confirms it, the Supreme Court of the United States can revise that decision.

FIELD, C. J. delivered the opinion of the Court—COPE, J. and NORTON, J. concurring

This is an action of ejectment to recover the possession of a tract of land known by the name of the "Rancho Laguna de la Merced," situated partly in the county of San Francisco and partly in the county of San Mateo. The plaintiff de-rains his title from the former Mexican Government through a grant issued by the Governor of California to one Galindo in September, 1835. Some of the defendants rested their defense upon the inability of the plaintiff to establish a right to the possession, simply denying in their answers the allegations of the complaint; but the majority of them also set up title in themselves to specific parcels of the premises as pre-emptioners under the laws of the United States, and each of them demanded a separate verdict. The Court instructed the jury to find generally in favor of two of the defendants, and to render a separate verdict against each of the other defendants, with a qualification, however, which in effect rendered the instruction one to \*find generally against [576]

each of the latter defendants. The verdict rendered was substantially in conformity with the instruction. To its form objection was taken at the time, but it does not appear from the record in what particular it was urged that its form was defective. The objection as stated was too general to merit consideration.

The grant to Galindo cedes the tract known by the name of "Laguna de la Merced," and contains the usual conditions annexed to grants in colonization. It authorizes the inclosure of the land, with a reservation of the crossings, roads, and servitudes, and confers upon the grantee the free and exclusive enjoyment of the same, with a right to subject it to such use and cultivation as may suit his convenience; and requires the erection of a house thereon and its inhabitation within one year. Immediately after its receipt the grantee entered upon the premises, and within the period designated erected a house thereon and occupied it for nearly two years, when he sold and conveyed his interest to Francisco de Haro. The latter immediately went into possession, and resided with his family upon the premises until his death in 1848 or 1849. In 1852 the claim for the land embraced by the grant was presented by his heirs to the Board of Land Commissioners for confirmation, and by the decree of that body, and afterwards on appeal by the United States District Court, was confirmed. The decree of the latter tribunal became final by the refusal of the Government to prosecute an appeal therefrom, and by the stipulation of the District-Attorney. The validity of the grant is, therefore, a settled question for all time. (*Mott v. Smith*, 16 Cal. 551.)

As we have already observed, the grant is for a specific tract of land. In this respect it is distinguished from a large class of grants of mere quantity within vague and undefined boundaries, like the grant of Alvarado, under which Fremont claimed. In these latter cases it was undoubtedly the intention of the Government simply to indicate the general locality from which the quantity granted might be selected, and not to pass the entire property within the exterior limits designated. Here the case is different. Here a specific tract, known by a particular name, is ceded, and reference is made to a map accompanying the petition of the grantee for its

\*boundaries. The petition represents the tract to be [577]  $\frac{1}{2}$  league in length, and a half of a league in width, more or less. A map similar to the one referred to was required by the Mexican Regulations of November, 1828, which were adopted to carry into effect the Colonization Law of August, 1824, in all cases where a grant of lands was solicited. And the grant usually followed the map or the petition in the general description of the land, and where a certain quantity was stated in the petition to be embraced within a particular tract named or within certain specified boundaries, it was customary, in order to prevent mistakes or imposition, to insert a clause reserving for the benefit of the nation any surplus which might be found upon a survey and measurement by the officers of the Government. (*Ferris v. Coover*, 10 Cal. 621.) Until by such a proceeding it was officially determined that within such particular tract or designated boundaries there was a surplus, and it was set apart, the right to the possession of the entire tract rested with the grantee. Until then, as we said in *Cornwall v. Culver*, 16 Cal. 429, "no individual can complain, much less can he be permitted to determine, in advance, that any particular locality will fall within the supposed surplus, and thereby justify its forcible seizure and detention by himself. If one person could in this way appropriate a particular parcel to himself, all persons could do so; and thus the grantee, who is the donee of the Government, would be stripped of its bounty, for the benefit of those who were not in its contemplation and were never intended to be the recipients of its favors."

To this doctrine of the right of the grantee until the official measurement, the common objection is urged that under it double or treble the quantity intended to be ceded by the Government may be possessed by him. Under a grant, it is said, of a tract supposed to embrace but one league, the grantee may, in accordance with this doctrine, recover two or more leagues, and parties equally entitled to the consideration of the Government be thus excluded from settlement upon land which will ultimately be determined to be part of the public domain. The objection thus urged is more specious than sound. If there be a surplus within the designated boundaries of the tract over the specific quantity alleged

[578] \*by the grantee in his petition, or intended to be ceded by the grant, the Government can at any time, by directing its measurement and segregation, restrict the grantee's possession. The grantee cannot himself make the measurement and segregation so as to bind the Government. He cannot know what particular part of the general tract the Government may assign to him, or what part it may reserve to its own use, or offer for sale, or settlement. He is, therefore, directly interested until the official segregation to protect the entire tract from waste and injury, and to improve it; and until then, third persons cannot question his right to the possession of the whole. They have no authority to fix the limits of his possession, under any pretense of a desire or intention to make a settlement upon the surplus which the tract may contain over the specific quantity designated. Lands thus situated are not open to settlement by the legislation of Congress, but on the contrary are expressly exempted therefrom. The determination, therefore, of the limits of the grantee's possession is a matter resting solely between himself and the Government. Were the rule otherwise, the grantee would find his possession limited, first in one direction and then in another, each intruder coveting a particular tract, asserting that it fell within the surplus reserved to the uses of the nation, until at last the grantee would be excluded from the entire tract. If the doctrine we have stated be not correct, when applied to a grant embracing within its boundaries a large surplus, it is not correct when there is any surplus, even if it be only of a few acres instead of leagues. The surplus acres would be asserted to lie in every portion of the general tract, according to the views or designs of the particular trespasser.

There is indeed no middle ground between the doctrine we have stated and the doctrine which denies to the grantee all right of possession to any portion of the granted premises until the official segregation; and it will not be pretended that under the Mexican law, or, to speak more accurately, under the construction given to that law by the Mexican authorities in California, possession was withheld until such segregation was had. Under that law, the segregation was effected by the ceremony known as the delivery of juridical

possession. But this proceeding could not be legally taken \*at all until the concession had been approved [579] by the Departmental Assembly, and such approval was often delayed for years. In numerous cases, it had not been obtained when by the conquest the jurisdiction of the Assembly was displaced. Yet the grantee generally took possession at once upon the issuance of the grant, and his possession was respected, both by the authorities of the Government and the adjoining proprietors. It is true, the Mexican Regulations of 1828 contemplated that the approval of the Departmental Assembly should be obtained to the concession of the Governor before the definitive grant issued. So, where the grantee regularly received his title papers the concession was final. The law then intended an immediate delivery of the possession by the proper magistrate of the vicinage. This proceeding had a double operation: first, to make a formal tradition or livery of seizin of the property, which was essential under the civil as at the common law; and second, to measure off and segregate the specific quantity granted, and establish its boundaries. But in time the practice grew up of issuing the final title papers without waiting for the approval of the Departmental Assembly, and as juridical possession could not regularly be made previous to such approval, a provisional possession of the entire tract designated was permitted. Conditions were annexed to grants thus issued, substantially similar to those annexed to grants issued subsequent to the approval. They conferred upon the grantee the same right to the exclusive use and enjoyment of the land, and oftentimes exacted the construction of a house thereon, and its inhabitation, within a year afterwards. Independent of express conditions on this point, the grants were held subject to the same conditions of cultivation and occupancy, under the Regulations of 1828, as grants already confirmed, and a compliance with these conditions was required to avoid a denouncement and a possible forfeiture of the land. And such compliance, as we observed in *Cornwall v. Culver*, 16 Cal. 426, is considered by the tribunals of the United States as a most material circumstance in determining the right of the grantees to a recognition and confirmation of their claims.

The counsel of the defendants, though controverting this view of the right of the grantee until the official [580] measurement, rested their \*defense chiefly upon an alleged selection and location of the specific quantity designated in the grant by parties claiming under him, and their disclaimers of title to the remainder. The proof they offered on this point was excluded, upon the objection of the plaintiff, and the ruling in this respect constitutes the principal error upon which they rely for a reversal of the judgment.

There is no doubt that a selection and location of the specific quantity may be made by the grantee (and of course by parties claiming through him) under such circumstances and accompanied with such disclaimers as to estop him from the assertion of any title or right to the possession of the remainder existing within the exterior boundaries of the general tract, until by the action of the Government it is determined that his claim under the grant shall be satisfied by land elsewhere selected. There is nothing in the nature of a colonization grant prohibiting him from restricting, if so disposed, his general right to the possession of the entire tract. And we accept as substantially correct the position of counsel that "when the grantee selects his location and quantity, uses it, leases it, sells or mortgages it, and disclaims title to the remainder, it (the selection) is, and ought to be, obligatory on him until the Government overrules his election and assigns him the land elsewhere." And we agree with counsel in their statement that: "by this rule, no hardship is imposed on the grantee. He selects the quantity he is entitled to, and is protected in the enjoyment of it pending his proceedings to perfect the title; and if the Government repudiates his selection and assigns him other lands, his title attaches to the new location. In this way exact justice is done to all. The grantee gets all the grant entitles him to, and settlers outside his location are not disturbed, unless the Government, in the exercise of its sovereign right to segregate the lands of the grantee from the public domain, shall include their possessions in the tract finally awarded to the grantee; in which event their rights must of course yield to his." The question, then, for determination is whether the proof offered

tended to establish any binding selection and location under the grant to Galindo. It is not pretended that any such selection and location were made previous to the year 1853. Up to that time, from the issuance of the grant in 1835—a period of nearly \*eighteen years—the grantee, or [581] the De Haros claiming under him, were in the peaceable and exclusive possession and enjoyment of the entire tract. The grantee, soon after the concession, built a house upon it near its southern line, and occupied the house for one or two years. De Haro built another house near the same spot, and a third house near the northern line of the tract. Both parties resided upon the premises with their families, Galindo until his sale, and De Haro until his death in 1848 or 1849. The heirs of De Haro resided upon them after their father's death. During this long period no one, so far as appears from the record, questioned their right to the possession of the entire tract or disturbed them in its use. It is upon an alleged selection and location by a survey made in September, 1853, and alleged subsequent disclaimers of title to the lands outside of that survey, that the defendants rely. They offered to prove, substantially, that previous to June, 1853, the lands occupied by them had been “townshipped and sectionized” like other public lands of the United States; that in September, 1853, the grantors of the plaintiff caused a survey to be made of the specific quantity designated in the grant; that the claimants under the grant assented to such survey when made; that afterwards *some* of the grantors sold, mortgaged, and leased portions of the lands lying within the survey, and to the defendants and others publicly disclaimed having any title to or interest in the residue of the general tract; that acting under such disclaimers and acts of *some* of the said grantors they made their locations; and that they were not within the lines of the said survey. The proof thus offered was, in our judgment, properly excluded.

The defendants could not demand any protection solely as preëmptioners, for, until the official segregation of the specific quantity designated in the grant, the entire tract was expressly exempted from preëmption and settlement by the Act of Congress. Their right to freedom from disturbance in their occupation rested, therefore, upon the alleged assent

of the claimants to a restriction of their rights to the tract surveyed, and their alleged disclaimers as to the balance. But nearly all these claimants—who were seven in number—were incapable of giving any binding assent to such restriction, or making any binding disclaimers. Three of [582] them at the \*time were infants, and two of them were under the disability of coverture. Besides, only a portion of the claimants were grantors of the plaintiff, and it was not in the power of *some* of them to affect by their action or disclaimers the rights of the other grantors or other claimants. No action of a portion of several tenants in common can impair the rights of their co-tenants.

There is nothing in the language of the Court in *Riley v. Hirsch*, 18 Cal. 198, which conflicts with the views we have here expressed. That case was an action of ejectment for the possession of certain real estate situated within the City and County of Sacramento, covered by the grant issued by Governor Alvarado to John A. Sutter in June, 1841. The grant embraced a quantity exceeding the eleven leagues ceded, though from the reservation of "the lands inundated by the impulse and currents of the rivers," it was difficult, if not impossible, without a survey, to state with anything like accuracy the extent of the excess. But it appeared from the evidence that Sutter had been in possession of the land embraced within the county of Sacramento for years, both before and after the cession of the country to the United States, asserting ownership of it under his grant, and subjecting it to all such uses as he desired without disturbance from any one; and we held that the grant itself conferred a right to the possession—giving to it the same effect which was attributed to it by the Mexican authorities in California; and that though the specific quantity granted could only be definitively and permanently located by a survey and measurement by the proper officers of the Government, yet that it was competent for the grantee, to enable him to comply with the conditions annexed, to make a temporary selection and location, which would be binding and effectual as against intruders and trespassers, and all parties, until the action of the Government. We do not desire to qualify what we thus held. No party but the Government can question any selection made



by the grantee under his grant. As against all other parties it is sufficient for the grantee to show that the land selected lies within the boundaries designated in the grant. But to restrict the possessory right of the grantee to the selection made, the selection must be accompanied with such disclaimers as to the residue of the general tract as to operate as an estoppel upon him. There is nothing [583] in the present case creating such an estoppel upon the plaintiff or the parties through whom he claims.

We do not attach any importance to the fact that after the final confirmation of the grant a survey was made by the United States Surveyor-General, and returned to the District Court under the Act of 1860, such survey having been excepted to by the Government, and not having been approved by the Court. By that act, when a survey has been made and plotted, it is the duty of the Surveyor-General to publish notice of the fact for four weeks. In the meantime the survey and plot are to be retained in his office subject to inspection. If, upon the expiration of the publication, no application has been made for a return of the survey into the District Court for examination and adjudication, or if made, the application has been refused, the survey becomes final. On the other hand, if the survey be ordered into Court, it does not become final until it has been approved or has been modified and reformed by the decree of the Court. Until the survey is established in one of these ways, it is without any binding force. Until then it is only a preliminary proceeding, amounting in effect to no more than a mere report of the action of the Surveyor, filed in his office for the inspection of all parties interested, or returned by him into Court by its order, for examination and adjudication. Nor does it make any difference that the exceptions to the survey were taken by the Government, and not by the claimants. Until established in one of the ways we have mentioned, the survey is not binding upon either party. When it binds one party it binds both.

The right of one tenant in common to recover in the action of ejectment the possession of the entire tract as against all persons but his co-tenants, has been repeatedly held by this Court. (*Touchard v. Crow*, 20 Cal. 162; *Stark v. Barrett*, 15

Id. 371.) The action is merely for the possession; it determines no rights but those of present possession; and that one tenant in common has such rights as against all parties but his co-tenants is not doubted. The doctrine of the Court, therefore, only allows the enforcement by action of an acknowledged right.

Judgment affirmed.

[584] \*NORTON, J.—The usual form of Mexican grants in California is for a certain tract of land called by a particular name, having boundaries which are designated and also shown on a map, and stating that the land granted contains a specified quantity, a little more or less; that juridical measurement must be made, and that the surplus will remain to the nation.

The Supreme Court of the United States have decided that such grants convey only the quantity named, and not the whole of the tract described, in case such tract exceeds in extent the quantity named.

Under these circumstances, a question arises, whether, before a juridical survey, such a grant conveys a title to the whole of the land within the designated boundaries upon which an action of ejectment, can be maintained, or whether it merely conveys a right to have a particular portion laid off within those boundaries, and which right until such survey is but an equity, and not a legal title sufficient to sustain an action of ejectment for any particular portion.

That such a grant conveys a title upon which an action of ejectment may be maintained, for at least the quantity specified, has been several times decided by this Court, and I think must be considered as settled, so far as the question depends upon the judgments of the State Courts.

This point being established controls the case. If, before a juridical survey, the grantee can recover any particular portion, he can recover the whole.

The point urged by the defendants, that the plaintiff, or those under whom he claims, have limited their right of recovery to a particular portion by a temporary selection, cannot be sustained on the facts in this case, for the reasons given in the opinion of the Court, if such a consequence

could ever result from the acts of the grantee before a final survey.

The judgment should therefore be affirmed.

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**\*THE PEOPLE v. HARTLEY.**

[585]

**BOND, CONSTRUCTION OF.**—A bond in the following form: Know all men that we, A, as principal, and B, C, and D, as sureties, are bound unto the people in the several sums affixed to our names, viz: B in the sum of ten thousand dollars; C in the sum of five thousand dollars; D in the sum of three thousand dollars, etc., etc.—“for the which payment well and truly to be made we severally bind ourselves, our heirs,” etc.—and signed and sealed by the obligors, is held to be an instrument embracing several distinct obligations, each of which is a joint obligation of the principal and one surety, and not joint and several.

<sup>1</sup> **JOINT BOND WHEN INVALID.**—A bond, which in form is the joint obligation of a principal and his sureties, and not joint and several, and signed by the sureties but not by the principal, is invalid and not binding upon the sureties. *City of Sacramento v. Dunlap*, 14 Cal. 423, affirmed on this point.

**SIGNATURE OF PRINCIPAL.**—The absence of the signature of the principal obligor to an official bond is not a defect which may be cured by its suggestion in a complaint under the eleventh section of the Act concerning Official Bonds.

**APPEAL from the Sixth Judicial District.**

This is an action brought by the District Attorney of Yolo County on behalf of the People against H. H. Hartley, one of the sureties upon the official bond of W. N. Brooks, the former Treasurer of said county. The complaint sets forth the bond, and charges that Brooks, as Treasurer, was a defaulter in the sum of \$7,000, for which defendant is liable as surety. The complaint also suggests several “defects” in the bond, and among them the failure of Brooks to sign it, with a view to obviate their effect under the provisions of section eleven of the act entitled “An Act concerning Official Bonds,” approved February 9th, 1850.

The following is a copy of the bond:

“Know all men by these presents that we, William N. Brooks, as principal, and H. H. Hartley, Wm. Green, O. V.

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<sup>1</sup> Commented on in *People v. Love*, 25 Cal. 530. As to liability of sureties on official bond, see *People v. Evans*, 29 Cal. 429; *People v. Rooney*, Id. 643; *People v. Kneeland*, 31 Cal. 291; *Mendocino Co. v. Morris*, 32 Cal. 148.

Chapman, M. Bryte, G. W. Hunt, as sureties, are held and firmly bound unto the People of the State of California in the several sums as hereinafter specified and affixed to our names, viz.: Henry H. Hartley in the penal sum of ten thousand dollars; Wm. Green in the penal sum of five thousand dollars; O. V. Chapman in the penal sum of three thousand dollars; J. V. Hoag in the penal sum of three thousand dollars; W. G. Hunt in the penal sum of five thousand dollars; William Gordon in the penal sum of five [586] thousand dollars; ——— \*in the penal sum of ——— thousand dollars; ——— in the penal sum of ——— thousand dollars, for the which payment, well and truly to be made, we severally bind ourselves, our heirs, executors, administrators, and assigns firmly by these presents. Sealed with our seals and dated this twentieth day of September, 1859.

“Whereas, at the general election, held in the county of Yolo, in September, 1859, the above bounden William N. Brooks was duly elected County Treasurer in and for the county of Yolo: Now if the said William N. Brooks shall well and faithfully discharge according to law the duties of said office of Treasurer, then this obligation to be null and void, else to remain in full force and virtue in law.

“ ——— ———,	[L.S.]
“ HENRY H. HARTLEY,	[L.S.]
“ WM. GREEN,	[L.S.]
“ O. V. CHAPMAN,	[L.S.]
“ J. V. HOAG,	[L.S.]
“ MIKE BRYTE,	[L.S.]
“ W. G. HUNT,	[L.S.]
“ WM. GORDON,	[L.S.]
“ ——— ———,	[L.S.]”

Indorsed with certificates of the justification of the sureties, the approval of the County Judge, and of record in the office of the County Clerk.

The following is the eleventh section of the act entitled “An Act concerning Official Bonds,” approved February 9th, 1850, to which the opinion refers:

“SEC. 11. Whenever any such official bond shall not contain

the substantial matter, or condition or conditions required by law, or there shall be any defects in the approval or filing thereof, such bond shall not be void so as to discharge such officer and his sureties, but they shall be equitably bound to the State or party interested, and the State or such party may, by action instituted as other suits on official bonds, in any Court of competent jurisdiction, suggest the defect of such bond or such approval or filing, and recover his proper and equitable demand or damages from such officer and the person or persons who intended to become and were included as sureties in such bond."

\*The defendant demurred to the complaint, and the [587] demurrer was overruled, and no answer being made, plaintiff had judgment for the amount claimed, from which defendant appeals.

*H. O. Beatty and J. B. Harmon, for Appellant.*

The bond sued on is joint, so far as regards the principal and each of the sureties. In our view it is equivalent to seven distinct undertakings, all in one instrument. Brooks and Hartley undertake for \$10,000; Brooks and Green for \$5,000; Brooks and Chapman for \$3,000, and so on. The obligation of Brooks with each of the sureties was joint only, and not joint and several. It is evident Brooks intended to bind himself with each of the sureties separately. It is equally evident that each surety intended to bind himself for a specific amount, without any connection with his co-sureties as to that particular amount, except so far as he might claim or be liable for contribution in case of loss. Every contract signed by two or more promising to pay the same sum of money is joint, unless there be special words making it several, or joint and several. "We promise to pay" is just as much a joint promise as "we jointly promise to pay." This was the obligation of Brooks, as principal, and Hartley, as surety, to pay \$10,000 in certain contingencies. There are no words of severalty applied to their promise. The words of severalty used are in regard to the distinct sums for which the sureties bind themselves.

This Court in the case of the *People v. Edwards*, 9 Cal. 286, construe a similar instrument as we do this. If the obliga-

tion is joint, it is admitted to be within the decision in *Sacramento v. Dunlap*, 14 Cal. 423, and therefore void. But if it be construed as a joint and several bond, we contend that it is still within the decision in that case. And whether announced in that case or not, the law undoubtedly is that the failure of the principal to sign a joint and several bond makes it invalid as to the surety who does sign. (*Bean v. Barker*, 17 Mass.; *Sharp v. United States*, 4 Watt. 21; 21 Pick. 24; 16 Maine, 140.

The eleventh section of the Act concerning Official Bonds has reference only to defects in form, and not to a defect like this which makes the bond a nullity.

[588]     \**E. B. Crocker*, for Respondent.

The bond in the case of *Sacramento v. Dunlap*, as the Court there say, was "in form a joint bond only, and not joint and several," and the case was decided solely upon this distinction, the Court clearly holding that if the bond had been joint and several or several, the rule would have been different.

The simple question then to determine, is, whether this is a several or joint and several bond, for if it is either, then the defendant is bound, whether the principal signed it or not. Our position is, that it is a several bond by its terms. It commences by saying we are held and firmly bound in the "several sums as hereinafter specified and affixed to our names." Here is a clear expression of an intention not to be jointly but only severally bound.

It further states, "for the which payment, well and truly to be made, we severally bind ourselves, our heirs," etc. This is the portion of the bond in which the extent of liability, whether joint or joint and several, is usually expressed; and here the parties are careful to express their intention to be only severally bound. The word joint is not used in the whole instrument, but in all cases where the extent and nature of the liability is stated, the word several alone is used.

It will not do to say that it is a joint bond as between the principal and each of the sureties, and several as between the sureties, for the word "several in both instances qualifies the liability of each and all of the parties named in the in-

strument; whenever used it applies as clearly to Brooks as to any of the others.

That in a several or joint and several bond, the parties executing it are bound, though all the persons named in the bond do not execute it, see *Sacramento v. Dunlap*, 14 Cal. 421; *Cutter v. Whittemore*, 10 Mass. 444; *Parker v. Bradley*, 2 Hill, 586; *Adams v. Bean*, 12 Mass. 139; *State v. Bowman*, 10 Ohio, 445.

FIELD, C. J. delivered the opinion of the Court—COPE, J. and NORTON, J. concurring.

The bond executed by Hartley and others embraces several distinct obligations. The principal and each of the sureties bind themselves in certain sums designated; and as we read the instru-<sup>\*</sup>ment, not jointly and severally, [589] but only jointly. The term "severally," as used in the instrument, applies only to the different sums which the parties respectively specify as the limit of the liability they assume. Being a joint bond, the signature of the principal was essential to its validity and binding force upon the sureties. As we said of the bond in the case of the *City of Sacramento v. Dunlap*, 14 Cal. 423, so we may say of this: "The liability of the sureties is conditional to that of the principal. They are bound if he is bound, and not otherwise. The very nature of the contract implies this. The fact that their signatures were placed to the instrument can make no difference in its effect. \* \* \* Some one must have written his signature first; but it is to be presumed upon the understanding that the others named as obligors would add theirs. Not having done so, it was incomplete and without binding obligation upon either." (See *Bean v. Parker et al.*, 17 Mass. 591; *Wood v. Washburn*, 2 Pick. 24; *Sharp v. United States*, 4 Watts, 21; *Fletcher v. Austin*, 11 Vt. 447; *Johnson v. Erskine*, 9 Texas, 1.)

The defects in official bonds, which may be cured upon their suggestion in a complaint, do not embrace the absence of the signature of the principal obligor. Without his signature the instrument is not his deed. There is no bond of his in which defects can be suggested and cured.

These considerations dispose of the case, and render it un-

necessary to notice any of the other points discussed by counsel.

The judgment must be reversed and the Court below directed to enter judgment for the defendant upon the demurrer to the complaint; and it is so ordered.

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THE CITY AND COUNTY OF SAN FRANCISCO v.  
LAWTON *et al.*

**DECREE OF FORECLOSURE.**—Where some of the parties, defendants in an action to  
1 foreclose a mortgage, claim the property adversely to the mortgagor under paramount title, the decree should reserve their rights, not simply by a declaration that their rights are reserved, but by so limiting the relief awarded as to protect them.

**IDEM—RENTS AND PROFITS.**—Where defendants thus claiming adversely are in possession, a decree directing upon the sale (redemption not being made) a conveyance of the fee and a \*delivery of possession to the purchaser, and conferring  
[590] upon him, until redemption made, the right to recover the rents, issues, and profits of the land, is erroneous. In such case the decree must be limited to a sale of the rights and interests which the mortgagor possessed at the date of his mortgage, leaving the purchaser to assert his right to the possession, after receiving his conveyance, by the ordinary action of ejectment.

APPEAL from the Fourth Judicial District.

This is a suit to foreclose a mortgage. It was before this Court on a former appeal, at the July Term, 1861. The case is reported in 18 Cal. 465, to which reference is made for a statement of the issues raised by the pleadings. By the decision there made, the cause was remanded for a new trial, with a direction that, in any decree which might be entered for the plaintiff, all rights of the defendants in the mortgaged property, claimed under a title independent of that of the mortgagor, should be saved.

On the new trial, all the former testimony was admitted by stipulation, and defendants, who were in possession, introduced some additional proof, showing title in them to a portion of the premises under a patent from the United States, to which the mortgagor was a stranger.

<sup>1</sup> *Odell v. Wilson*, 63 Cal. 160.



The decree of the Court was as follows:

“It is, therefore, ordered, adjudged, and decreed, that all and singular the mortgaged premises mentioned and described in the complaint in this cause, to wit: [description of several tracts by metes and bounds, including lot on corner of Battery and Vallejo streets] or so much thereof as may be sufficient to raise the amount of \$58,700, the amount due to the plaintiff, for principal and interest and costs in the suit, and expenses of sale, together with counsel fees at the rate of five per cent. on the amount aforesaid, be sold separately, [if such sale can be made,] without material injury to the parties interested, at public auction, by or under the direction of the Sheriff of the county of San Francisco; that said sale be made in said county; that said Sheriff give public notice of the time and place of such sale, according to the course and practice of the Court and the law relative to sales of real estate under execution; and that the plaintiff, or any of the parties to this suit, may become the purchaser at such sale; and that the said Sheriff, after the time allowed by law for redemption has expired, execute \*and deliver to [591] the purchaser or purchasers of the mortgaged premises a good and sufficient deed or deeds *for the land in fee simple*.

“And it is further ordered, adjudged, and decreed, that the Sheriff pay to the plaintiff, or his attorney, out of the proceeds of the sale of said mortgaged premises, his costs in this suit, taxed at one hundred and fourteen dollars and seventy-five cents, said counsel fees at the rate of five per cent. on the amount reported to be due plaintiff, together with the said sum of \$58,700, with interest thereon at the rate of two per cent. per month from the date of this decree, or so much thereof as the said proceeds of sale will pay of the same, and that the said Sheriff take a receipt for the amount so paid, and return the same to this Court with his report, and bring the surplus money arising from said sale, if any there be, into Court, within five days after such surplus shall have been received, to abide the further order of this Court.

“And it is further ordered, adjudged, and decreed, that the defendants, and all persons claiming or to claim from or under them, and all persons having liens subsequent to

said mortgage by judgment or decree upon the lots of land described in said mortgage, and his or their personal representatives, and all persons having any lien or claim by or under said subsequent judgment or decree, and their heirs or personal representatives, and all persons claiming under them, be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to said mortgaged premises, and every part and parcel thereof, from and after the delivery of said Sheriff's deed.

"And it is further ordered, adjudged, and decreed, *that the purchaser or purchasers of said mortgaged premises, from the time of such sale until redemption, or if there be no redemption, until the execution and delivery of the Sheriff's deed, and the redemptioner, from the time of his redemption until another redemption, shall be entitled to recover from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof.*

"And it is further ordered, adjudged, and decreed, *that the purchaser or purchasers of said mortgaged premises at such sale be let into the possession thereof, and that any of the parties to this cause who may be in possession of said mortgaged premises, or any part thereof, and any person who since the com-*  
[592] *mencement of this suit \*has come into possession under them, or either of them, deliver possession thereof to such purchaser or purchasers, on production of the Sheriff's deed for such premises.*

"And it is further ordered, adjudged, and decreed, that all the rights which the defendants, Volney E. Howard, Duncan W. Perley, Edmond L. Gould, and Austin E. Smith, have acquired or now have, under the patent from the United States and tax deed, in and to the lot of land situated on the southwest corner of Battery and Vallejo streets, and first described in said mortgage, *are hereby reserved and saved to them and each of them.*"

Defendants moved for a new trial, which was refused, and from this order and from the decree they appeal.

*D. W. Perley*, for Appellants.

The decree does not conform to the directions of this Court on the former appeal. (See decision, 18 Cal. 465.) By the

decree, the land itself is to be sold; the Sheriff is to execute a deed in fee simple; the purchaser is to be entitled to the rents and profits of the property; and, finally, the defendants are to be turned out of possession.

If all this is to be done, how are defendants' rights under the patent saved? It was not the intention of this Court that a miserable and vague provision should be incorporated in the decree, merely declaring that all the rights of defendants under the patent should be protected; but it was the intention of the Court that in the substance and body of the decree those rights should be protected; that the Sheriff should not be allowed to sell anything but the right and title of Mowry, the mortgagor; that he should execute a deed simply for that right and title; and that the defendants should not in any manner be disturbed, either in their possession of the property or in the enjoyment of the rents and profits of it.

This would have been efficient and substantial protection. But as the decree stands it is as full and as ample to divest the defendants of all right and title in the property as if the patent of the United States did not exist.

Suppose this decree is carried out, what would be the result? Prior to redemption the defendants must give up the rents and profits of the property, and at the end of six months after sale \*they are turned out of possession. [593] What remedy have they then? Can they bring an action of ejectment against the purchaser to recover back possession of the property? By the ruling of this Court they could not successfully maintain such an action, for the very decree under which they were turned out of possession would operate as *res adjudicata* against them. (14 Cal. 634.)

*John McHenry*, for Respondent.

The decree is proper, and conforms to the direction of this Court on the previous appeal. In the decision on that appeal this Court, after stating that the defendants set up in their answer a title by patent and tax deed to a portion of the mortgaged premises, says: "Of the value of the titles conferred by those instruments it is unnecessary to express any opinion. Their validity is not the proper subject of determination in the present suit. It is only necessary to look

into them so far as to see that they are asserted in good faith, and are not merely pretenses for delay, and this being seen, the rights of the defendants, Howard and Perley, should have been reserved in the decree. If there were no other reason than the assertion of these adverse titles for making them parties, the suit should have been dismissed as to them. But there were other reasons." And the Court, after stating how the appellants deraigned title as there shown by the record before it from Mowry, adds: "The appellants thus succeeded to whatever estate the mortgagor possessed, and as such successors were proper and necessary parties to the foreclosure." And in another part the Court held that: "Whatever estate, if any, they (the appellants) have acquired from him is as much subject to the mortgage as it was previous to his conveyance to Sawyer. So far as they claim under him (Mowry) they are estopped equally with him from denying the efficacy of the mortgage." And the Court, in conclusion, held that the appellants were entitled to the insertion of a clause in the decree saving their rights under the patent and tax deed, and for the omission in that particular the former decree was reversed.

It is clearly manifest by the above extracts that the decree now under consideration is not contrary to, but conforms to all the principles laid down by the Court in its former [594] opinion. It subjects to sale all the estate which the appellants derived from the mortgagor. The title of the appellants under the patent and tax deed is not determined, or in any way passed upon, but all the rights of the appellants under said patent and tax deed are reserved and saved to them, and each of them.

This Court held that if the former decree had contained a clause saving to the appellants their rights under the patent and tax deed, it would have been sufficient; that for the "omission" in that particular the decree must be reversed. Now, if that decree would have been good by the insertion of the clause referred to, how can the counsel contend that the full and ample saving and protecting clause in this decree does not protect the rights of the appellants under the patent and tax deed?

FIELD, C. J. delivered the opinion of the Court—COPE, J. concurring.

Upon the foreclosure of the mortgage in this case the plaintiffs were entitled to a decree for the sale of all the rights and interests of the mortgagor. But inasmuch as some of the defendants, so far as the property situated on the corner of Battery and Vallejo streets is concerned, claim adversely to the mortgagor under paramount title from the Mexican Government, confirmed by a patent of the United States, the decree should have reserved their rights. Such was the purport of the previous decision in this case. The decree entered, however, goes beyond the decision, and practically nullifies and defeats it. It directs upon the sale, redemption not being made, a conveyance of the fee and a delivery of possession of the premises thus held adversely to the purchaser, and confers upon him until redemption made the right to recover the rents, issues, and profits of the land. The decree is in this respect palpably erroneous, and must be reversed. As the parties claiming adversely by paramount title are in possession, the decree must be limited to a sale of the rights and interests which the mortgagor possessed at the date of his mortgage, and the purchaser must, after receiving a conveyance, assert his right to the possession by the ordinary action of ejectment.

Judgment reversed, and cause remanded for further proceedings.

\*On a petition for rehearing the judgment of the [505] Court was modified so as to direct with a reversal of the judgment of the Court below, the entry of a judgment by that Court pursuant to the views expressed in the opinion.

SAVINGS AND LOAN SOCIETY *v.* WILLIAM GIBB,  
EXECUTOR, ETC., *et al.*—SAME PLAINTIFF *v.* WALKER  
*et al.*

MORTGAGE ON SEPARATE PROPERTY OF PARTNER TO SECURE DEBT OF THE FIRM.—

Where one of two partners executes a mortgage upon his separate property to secure a debt of the firm, an action to foreclose the mortgage may, after the death of the mortgagor, be maintained against his executor, without any showing by the plaintiff that the partnership is insolvent, or that he has pursued his remedy upon the debt against the surviving partner.

**IDEM**—PARTIES IN ACTION TO FORECLOSE.—In such action, where the surviving partner is also the executor of the deceased partner, and claims as his devisee an interest in the mortgaged property, there is no misjoinder in making him, as an individual, a codefendant with himself as executor.

APPEAL from the Fourth Judicial District.

These are separate appeals from judgments of the District Court, entered in favor of the defendants and respondents, upon their demurrers to the amended complaints of the plaintiff, in each of the two cases.

The complaints are precisely similar, and, so far as they bear upon the questions raised upon the appeals, state the following facts:

That, August 31st, 1860, the defendants, William Gibb and Daniel Gibb, now deceased, but then in life, were partners under the firm name of Daniel Gibb & Co., and by their partnership name of Daniel Gibb & Co. borrowed of plaintiff \$25,000, to secure payment of which the said Daniel Gibb & Co. made and delivered to the plaintiff their forty-eight promissory notes, all dated August 31st, 1860, payable to plaintiff, for six hundred and fifty-seven dollars and fifty cents, the first on the thirtieth day of September, and the remainder on the thirtieth day of each month thereafter, one of which is as follows:

[596] \*"\$657 50. SAN FRANCISCO, August, 31st, 1860.

"On the thirtieth day of October, 1861, without grace, we promise to pay to the Savings and Loan Society, or order, at their office, the sum of six hundred and fifty-seven dollars and fifty cents, value received, with interest thereon at the rate of two per cent. per month from maturity until paid. And we further agree that if this note shall not

be paid by us according to its tenor and effect, then all the notes of this series bearing even date herewith and remaining unpaid, shall, at the option of the Savings and Loan Society, become immediately due and payable to the amount of nineteen thousand three hundred and sixty dollars, which will be their total value at the maturity of and including this note, with interest thereafter on said total value at the rate of two per cent. per month until paid.

“The series of notes of which this is one is secured by mortgage of even date herewith. DANIEL GIBB & Co.”

That of the sums secured by these notes, including the above note and interest, the amount of \$19,360 remains due and unpaid, and with the interest thereon at the rate of two per cent. per month from October 30th, 1860, is now due and payable.

That Daniel Gibb, in his lifetime, to secure the payment of these notes and the said moneys and interest thereon, as mentioned in the notes according to their terms, at the same time with their date, executed under his hand and seal, and delivered to the plaintiff, a mortgage conditioned for the payment of the notes and interest thereon at the rate, times, and in the manner specified in the notes, and according to their conditions, whereby he mortgaged to the plaintiff all that parcel of land, etc.

That, among other things, Daniel Gibb, by his said mortgage, covenanted and agreed that he would pay at maturity all taxes, street assessments, liens, and other incumbrances then subsisting or which might be laid or imposed on the premises, and all taxes which might at any time be laid upon the mortgage or the money secured thereby; and if default should be made in such payments, the plaintiff might pay off at pleasure any such taxes, street assessments, etc., as in the opinion of the plaintiff might in any wise affect or impair \*the mortgage; and on all moneys paid out [597] for the purposes aforesaid, interest should be allowed from the date of the several payments at the rate of two per cent. per month, and such payments and interest should be secured by the mortgage.

That, by the covenants and conditions of the mortgage, it

was among other things further agreed, that if default should be made in the payment of any one or more of said notes, or in the performance of any of the covenants, etc., the whole of the notes unpaid at the time should, at the option of the plaintiff, forthwith become due, and legal proceedings forthwith be taken for the foreclosure.

That said Daniel Gibb further covenanted that in such action a receiver should be appointed, etc., with power to collect the rents, etc., until sale of the premises under the decree of foreclosure, and said receiver should hold the same for any deficiency which might exist in case the proceeds of the sale should not be sufficient to pay the amount of the decree and costs, his commissions to be paid out of such rent, etc.

That due demand of the payment of the notes has been made, but Daniel Gibb, in his lifetime, and William Gibb refused, and William Gibb, since the death of Daniel Gibb, still refuses to pay the same, and plaintiff has therefore elected and declared the entire sum to be presently due and payable: of which election and declaration William Gibb, executor of Daniel Gibb, and in his own right has had due notice.

That on the seventeenth day of December, 1861, Daniel Gibb departed this life, leaving a last will wherein William Gibb was named sole executor, which was admitted to probate, and letters testamentary were issued to William Gibb, who duly qualified and is now acting as such executor.

That the defendants, William Gibb, Ellen W. J. Gibb, and Thos. M. Gibb, minor son of Daniel Gibb, James Paterson and Alexander Forbes have and claim interests in and rights to the premises as devisees of Daniel Gibb and otherwise, which interests and rights are subsequent to and subject to plaintiff's mortgage.

The plaintiff prays for a receiver, the ascertainment of the amount of all taxes now subsisting, or which may be levied, and that the Sheriff or receiver be directed out of the [598] rents or proceeds of the \*property, after paying costs of suit, to pay such taxes, etc., and "that the usual judgment or decree may be made for the sale of the mortgaged premises aforesaid, and for the payment out of the proceeds of said sale, of the amount due the plaintiff for principal and interest on said notes and mortgage, together with costs," and



all amounts paid by plaintiff for taxes, etc.; and if it appear from the Sheriff's return that there is a balance still due plaintiff, after applying all the moneys, etc., "that the said estate of Daniel Gibb may be adjudged to pay such deficiency in due course of administration thereafter, and that a judgment may be docketed for such balance and duly certified to the Probate Court;" and that the defendants be barred and foreclosed, etc.

The defendants, William Gibb, executor, etc., William Gibb, James Paterson, and Alexander Forbes, each demurred to the complaints. The demurrer of William Gibb, as executor, was on the grounds, among others—1st, of a misjoinder of parties defendant in this, that as executor he was improperly united with himself individually and as surviving partner; 2d, of improper union of several causes of action, viz.: a cause of action against him as executor upon the mortgage, and a cause of action against him individually and as surviving partner upon the promissory notes; and 3d, no cause of action. His demurrer in his own right was the same, *mutatis mutandis*.

The demurrers were, after argument, sustained by the Court, with leave to the plaintiff to amend within ten days, which he declining to do, judgment was entered in favor of the defendants. From this judgment plaintiff appeals.

*D. Bixler*, for Respondent, in support of the demurrers.

I. The surviving partner is improperly joined with the executor of the deceased partner.

1. Although the prayer of the complaints asks for no specific relief against William Gibb, except that he be foreclosed of all equity of redemption, yet the complaints contain all the allegations necessary to charge him as surviving partner. They aver—1st, that William and Daniel Gibb were partners under the name of Daniel Gibb & Co.; 2d, that William and Daniel, partners by their \*partnership name, [599] borrowed the money of plaintiff, and to secure its payment made their notes, of which one is set forth; 3d, that demand was made for payment of the notes, and Daniel, in his lifetime, and William, refused, and William, since Daniel's death, refused to pay the same; and 4th, that the plaintiff

had declared the entire sum to be presently due, of which William, executor, and in his own right, had notice.

And notwithstanding the averment that William claimed an interest in the premises as devisee or otherwise, we are authorized by the other averments to conclude that he was made a defendant both as the surviving partner and as the claimant of such interest.

2. No action at law could be maintained against the executor upon the notes. (*Grant v. Shurter*, 1 Wend. 152.)

3. In this State, even in cases of joint and several contracts, the administrator or executor cannot be joined at law with the survivor, for one is charged *de bonis testatoris*, and the other *de bonis propriis*. (*Humphreys v. Yale*, 5 Cal. 176; *May v. Hanson*, 6 Id. 642.) See also *Voorhies v. Childs' Executor*, 17 N. Y. 357.

4. The specific prayer of a bill in equity, though a demurrer will not lie to it as such, is nevertheless very important, and sometimes conclusive, as to the question of who are or are not proper parties. (Calvert Parties in Equity, \*11-13; 15 Law Lib. 7, 8; Wigram Discovery, 74, 75.) This rule is equally applicable under our code of practice, especially in a case where the averments in the complaint are in their nature equally suited to different causes of action, and where the cause of action throws light upon the question of parties; and *vice versa*.

II. In making the mortgage of his separate property for the debt of his firm, Daniel Gibb was a partner becoming a surety for the partnership; and upon his death his executor may insist, that in any suit to charge the estate, the creditor shall aver and prove that he has first exhausted his remedy against the surviving partner; or at least, that the partnership is insolvent.

Upon the dissolution of a partnership by death, the entire assets pass to the surviving partner, and become the primary fund for the satisfaction of the debts of the firm, and the surviving partner is in the first place liable to the creditors. Hence the rule is in the \*American Courts, as [600] it formerly was in the English Courts until changed by Lord Brougham, that the creditors of a partnership cannot come into equity against the estate of a deceased partner,

without alleging and proving that he has exhausted his remedies against the survivor; or at least, that the partnership is insolvent. (*Lawrence v. Trustees of Leake & W. Orphan House*, 2 Denio, 577, 586; 6 and 7 Id. 588, and 9 Id. 591-594; *Voorhies v. Baxter*, 17 N. Y. 354, 357; *Copcutt v. Merchant*, 4 Bradf. Sur. 18, 20; *N. River Bank v. Stewart*, Id. 254; *Higgins v. Freeman*, 2 Duer, 650; *Slatter v. Carroll*, 2 Sandf. Ch. 580; *Alsop v. Mather*, 8 Conn. 584, 7 and note a; *Reimsdyk v. Kane*, 1 Gall. 371, 384, 385; *Dayton on Surrogates*, 293-295; *Willard's Eq. Jurispru.* 719, 720; *Filley v. Phelps*, 18 Conn. 295, 301, 302; *Sturge v. Beach*, 1 Id. 509; *Caldwell v. Stillman*, 1 Rawle, 212.)

In this State, it is settled that the debt for which a mortgage is given is the principal thing, and the mortgage is but the incident. (*McMillan v. Richards*, 9 Cal. 407.)

In the present case, the notes for which the mortgage was made were a partnership debt, and such debt was and is the principal thing. As the holders of those notes, the plaintiffs below were and are creditors of the partnership of Daniel Gibb & Co. Consequently, the rule above stated applies.

It is no answer to our objections to say that these are bills merely to foreclose the mortgages as against the estate of Daniel Gibb and his executor as the representative thereof for several obvious reasons. In the first place, Daniel Gibb made the mortgages merely as a security for the payment of certain obligations of his firm. Hence his contract was that the property should be liable for the debt only secondarily and after the assets of the copartnership had been exhausted. In the next place, he assumes no personal obligation by the mortgages, which contain no express covenant for the payment of the money, and the only and full extent of which contracts is that certain property therein described is pledged as security for certain debts of another party, namely, the firm of Daniel Gibb & Co. The mortgages therefore are in this respect what are generally known as "dry mortgages," that is, mortgages in which nothing is bound but the property mortgaged, \*and the mortgagor incurs no [601] personal liability. (*Scott v. Fields*, 7 Watts, 360, 361; *Salisbury v. Phillips*, 10 Johns. 57.)

The result of this is that whatever might have been the

case during the lifetime of Daniel Gibb, yet after his death, his entire estate, real and personal, including of course the property mortgaged, being subjected by our probate law to the lien of the creditors, who are represented by the executor, the latter for them as well as for other parties interested in the estate, heirs, etc., may and should in these cases raise the objection that the plaintiff should first exhaust its claim against the partnership property, by a suit on the promissory notes, before resorting to the mortgages, which were given merely by way of secondary liability as security. (*Beckett v. Selover*, 7 Cal. 238, 239.)

III. These bills cannot be maintained as bills merely to foreclose the mortgages against the estate of Daniel Gibb, under and by which mortgages he assumed no personal liability and on which there could be of course no decree for a money judgment, and no execution for a deficiency as against the estate or the executor.

If these suits can be maintained as suits merely to foreclose the mortgages, the absurd consequences would be that in case of a deficiency upon a sale, a second suit would be necessary as against the surviving partner, which is inverting not merely the order of liability, but the order of proceedings as known and established in Courts of Law and Equity.

In those cases where, as here, the deceased partner was also a surety for the partnership, the rule has been enforced upon the objection of the executor. (*Averill v. Loucks*, 6 Barb. 470, 477; *Wilder v. Keeler*, 3 Paige, 167, 172, 176.)

It is a well established doctrine that joint creditors will not be permitted to reach the individual estate of the deceased partner until all the separate creditors are satisfied. (*North River Bank v. Stewart*, 4 Brad. Sur. 257, and cases cited.) And as the law confers upon the surviving partner the title to all the effects of the copartnership, with the burthen of paying the debts, it would be oppressive in many cases, and unjust in still more, if the creditor were permitted to resort to the deceased partner's individual property for payment, leaving the primary fund for such payment in  
[602] \*the possession of the surviving partner. And the presumption is that the primary fund is sufficient to meet the demands upon it. (*Voorhies v. Baxter*, 17 N. Y.

356; Probate Act, sec. 198; *Slatter v. Carroll*, 2 Sandf. Ch. 580.)

If the separate creditors have the right to require a resort to the primary fund, so also has the executor who is their representative. Vid. *Beckett v. Selover*, above cited, where the Court say: "The administrator is more the representative of the creditor than of the heirs. In all suits for the benefit of the estate, he represents both the creditors and the heirs; and in proceedings to sell property, he is not the sole representative of the estate, but the moving party on behalf of the creditors."

IV. Two causes of action are improperly united in the complaint: 1, a cause of action upon the mortgage against the executor; and 2, a cause of action against the surviving partner upon the notes.

The liability of Daniel Gibb being limited, as already shown, to the property pledged, no judgment can be docketed against his estate for a deficiency on the sale as prayed, and the complaint in that respect shows no cause of action as against the executor. The prayer for specific relief throws light upon this point.

*O. L. Shafter*, for Appellant, in reply.

I. The objection that the surviving partner is improperly joined with the executor of the deceased partner goes upon the ground, that where one of two joint contractors dies, there can be no remedy against the estate of the deceased, until after all legal remedies have been exhausted against the survivor. To this objection there are several answers.

1st. If this were in fact an action upon a contract made by Daniel and William Gibb jointly, it might be maintained against Daniel's estate, without an averment that William Gibb, the survivor, was insolvent, or that he had been pursued at law to judgment, execution, and return *nulla bona*. In short, we deny the principle contended for.

We admit that in case of the death of one of two joint contractors, the remedy at law is against the survivor alone. (1 Chit. Pl. 36.) And we admit further, that by the doctrine formerly \*held, the joint creditors had no claim whatsoever in equity against the estate of the [603]

deceased contractor, except when the surviving debtor was at the time, or subsequently became, insolvent or bankrupt. But that doctrine has since been overturned; and it is now held, "that in equity all partnership debts are to be deemed joint and several, and consequently that the joint creditors have in all cases a right to proceed at law against the survivors, and an election also to proceed in equity against the estate of the deceased partner, whether the survivors be insolvent or not. The consequence is that the joint creditors need not now wait until the partnership affairs are wound up and a final adjustment thereof is made, but they may at once proceed, as upon a joint and several contract, in equity against the estate of the deceased partner, although in any such suit the surviving partners must be made parties, as persons interested in taking the account." (See Story on Partnership, sec. 362, and the cases there cited; *Bardwell v. Perry*, 19 Vt. 292.)

2d. But should the principle contended for by the respondents be admitted, it has no application to the case made in the complaint.

The complaint discloses two contracts: one a promissory note executed in effect by Daniel and William Gibb jointly, the other a mortgage contract executed by Daniel Gibb alone. Though these contracts are related to each other, they are in no sense identical or convertible. The giving of the notes did not even draw after it the giving of the mortgage contract as a necessity. It was executed by the several volition and several act of Daniel Gibb, and it was in short to all intents and purposes his several contract, given to secure another contract made by him jointly with his brother. Now this action is not based upon the joint contracts, nor is it brought to enforce those contracts *in personam* as against any one. It is founded upon the mortgage contract, and seeks redress, for a breach of one of its leading provisions, by acting upon the mortgaged lands *in rem*. On the joint contracts, to wit, the notes, the plaintiff could bring no such action, nor on them could the plaintiff in any event be entitled to any such redress.

The case actually presented, then, is without the [604] scope of the \*principle invoked by the respondents;

for that contemplates a case of a joint contract, one of the joint obligors being dead; but this case differs from that in both these governing particulars. To the mortgage contract there was but one signature and seal, and they were the signature and seal of Daniel Gibb.

Aside from what may be called the main contract contained in the mortgage, whereby the land was put in pledge as a security for the debt, there is a diversity of minor covenants contained in the mortgage, to all of which William Gibb is and has ever been a stranger. Daniel Gibb covenants that "he will pay and discharge at maturity all taxes, street assessments, liens, and other incumbrances;" that if he fails to do so, then that the plaintiff may pay them, and claim two per cent. per month interest thereon; that in the event of foreclosure, counsel fees shall be allowed the plaintiff at the rate of five per cent. on the amount due, as a part of the costs of the action; and that upon that event a receiver may be appointed, with full power to collect the rents and profits until the mortgaged property shall be sold, his commissions and charges to be paid out of the avails.

These subordinate contracts are the several engagements of Daniel Gibb; they are found in the mortgage, but no one of them is inserted in the notes. If they cannot be enforced against Daniel Gibb's estate directly, then they cannot be enforced at all. As to them, they cannot be enforced against William Gibb as survivor, for he was never a party to them. The question then is, are they dissolved by the death of the man who made them?

It is said, on behalf of the respondents, "that the mortgages contain no express covenants for the payment of the money." That is true; but it is also true that Daniel Gibb covenanted and agreed, in the mortgages, "that if default should be made in the payment of any one or more of said promissory notes, that legal proceedings might forthwith be taken for the foreclosure of said mortgages for the payment of all moneys due to said Savings and Loan Society." The contingency named has happened, and we are now seeking in this action to enforce the liability which this several covenant of Daniel Gibb created. As to this covenant, there is no survivorship. True, Daniel Gibb does not bind himself

[605] \**in personam* to pay the notes, but having absolute dominion over the lands he, by his several acts, subjects them to a liability to pay the notes on the happening of a certain event. The joint promises contained in the notes bind the promissors personally; but they have no relations to the lands mortgaged, or to any other lands. The several covenant in question binds the land; it is through the intervention of that covenant alone, or an obligation akin to it implied by law, that the plaintiffs have or ever had any right to come upon the land, and if the plaintiffs cannot pursue the land until after they have exhausted their *in personam* remedies upon the joint promises, it must be for the reason that this several covenant was discharged by the death of Daniel Gibb, and not for the reason that its obligations "survived" to his brother.

3d. William Gibb is not joined as "surviving partner," as the objection assumes. He is nowhere called "surviving partner" in the complaint, nor is any personal relief asked against him as such. On the contrary, it is prayed that if a balance should remain after the avails realized on a sale of the mortgaged premises shall have been exhausted, that such balance should be certified to the Probate Court. William Gibb is made a party: first, as executor of the deceased mortgagor; and second, in his own right, on the ground that he "claims interests in and rights to the said premises as devisee of said Daniel Gibb;" and the only relief asked against him is that his title as such devisee may be foreclosed.

II. To the second objection of the respondents, that "in making the mortgage of his separate property for the debt of his firm, Daniel Gibb was a partner becoming a surety for the partnership; and upon his death his executor may insist that in any suit to charge the estate the creditor shall aver and prove that he has first exhausted his remedy against the surviving partner, or at least that the partnership is insolvent"—we answer: 1st. Though the mortgage contract was a security for the debt, yet it is not a contract of "suretyship," for Daniel Gibb does not bind himself personally for the debt of another, (1 Par. Con. 493,) but pledges his land for the payment of a debt which he himself owes jointly with another. The consideration of the mortgage moved to him,



and none the less so for the reason that he shared the benefit of the \*loan with his brother. If he was a [606] surety, he was one merely for the fulfilment of contracts which he had signed as a principal party, and which he in his lifetime was personally bound to perform. None of the principles applicable to the contract of suretyship could be worked in his behalf. Could he in his lifetime have compelled his firm, by bill in equity, to pay the debt? Could he have compelled the present plaintiffs to sue him and his brother *in personam* on the notes?

2d. Admitting that the mortgage contract was a contract of suretyship, we deny that the property mortgaged "would be liable only secondarily, and after the assets of the copartnership had been exhausted."

A surety as such may by bill compel the debtor to pay the debt (1 Sto. Eq. sec. 327;) he may by bill compel the creditor to sue the debtor, if he, the surety, tenders adequate indemnity for costs and expenses (Id.); and if the surety pays the debt himself, he is entitled to an assignment of the claim, and to be subrogated to all securities which the creditor may have in his hands; but in no treatise or decision are there any traces of the doctrine that a creditor cannot pursue a surety until remedies against the principal debtor have been exhausted. By paying off the debt for which he is bound, the surety can at any time put himself in a position to sue the principal. (*Hartman v. Burlingame*, 9 Cal. 561; *Palmer v. Vance*, 13 Id. 553.)

*Wilkerson v. Daniels*, 1 Iowa, 179, was an action to foreclose a mortgage executed by the defendant to secure a note made by three others. It was held that the action was well brought, and still there was no averment that any proceedings had been taken against the makers of the note. It was held also that the makers of the note were not proper parties defendants. The last ruling must necessarily have proceeded upon the ground that the mortgage contract was not only the several contract of the defendant, but also upon the ground that the persons for whose benefit it was executed were neither party nor privy to its obligation. (See also 2 Hil. Morts. 121; Coote on Morts. 354.)

3d. If Daniel Gibb could not have insisted in his lifetime

that the lands mortgaged were exonerated until after [607] all *in personam* \*remedies were exhausted upon the notes, and that he could not has already been shown, then his executor cannot so insist.

In respondents' brief we are reminded that "the debt is the principal thing, and the mortgage is but an incident," and from this we suppose that counsel would have us infer that whatever is true with regard to personal remedies upon the notes is equally true with regard to the remedy upon the mortgage. A mortgage is so far an incident to the debt that it will follow the debt, by operation of law, into the hands of an assignee; and also, if the debt is paid, the mortgage will be in effect satisfied. But because a mortgage is collateral to the debt, it by no means follows that where the debt is joint and the mortgage several that the latter is therefore joint in legal effect, or that because one is personal that therefore the other is personal, or that because the doctrines of survivorship have to do with the one that they therefore have the same relations to the other.

Counsel also suggest that "if these suits can be maintained as suits merely to foreclose the mortgages, the absurd consequences would be that in case of a deficiency upon a sale a second suit would be necessary against the surviving partner." The absurdity is not acknowledged. A gives a mortgage to secure the debt of B; the mortgage is foreclosed against A, the man who made it; the avails of the sale are inadequate to pay the debt; a personal action may be brought against B on his personal contract to recover the balance. In strict foreclosure, if the value of the premises fell below the amount of the debt, a personal action would lie on the bond or note to recover the difference. (*Lovell v. Leland*, 3 Vt. 581.)

And here, if the avails of the lands mortgaged should be inadequate to the payment of the debt, it may be true that the general estate of the mortgagor could not be reached for the balance, except through the personal contracts contained in the notes, and it might be necessary to submit also to the doctrine that the surviving partner should first be pursued as such; but in this there would be no legal absurdity, for it would be in strict keeping with the analogies above stated.

III. Respondents have cited cases to show that "it is a well \*established doctrine that joint creditors [608] will not be permitted to reach the individual estate of the deceased partner until all the separate creditors are satisfied.

This position goes further than the one previously advanced; for if the position be a tenable one, then after the partnership funds had been exhausted in proceedings upon the notes against William Gibb as survivor, if an unsatisfied balance should remain, that balance could not be collected out of the estate of Daniel Gibb until all of his private debts had been paid.

1st. There is no such principle. The rule that separate creditors are to be first paid out of separate property is not based upon any general principle of equity jurisprudence, but upon an express provision of the English bankrupt laws. (*Bardwell v. Perry et al.*, 19 Vt. 292.)

2d. The doctrine asserted cannot be invoked, except when it appears that there are separate creditors, and by them; and not by them even, except where it appears that the separate property is inadequate, or no more than sufficient to pay the separate debts. But here it does not appear that there are any separate creditors to be protected by the rule; there are no parties on this record alleging themselves to be separate creditors, and as such claiming the benefit of the rule. Although it may be true in a large sense, that an administrator "represents the creditors" of the deceased, as is insisted by counsel, and as was held in *Beckett v. Selover*, 7 Cal. 239, yet it does not appear that there are any private creditors of Daniel Gibb in the constituency of his executor; nor does it appear in any manner that the private estate of Daniel Gibb is not adequate for the discharge of every description of claim for which it is either primarily or secondarily responsible.

3d. The doctrine asserted contemplates the case of a creditor pursuing separate property upon a joint contract. Here the plaintiffs are doing nothing of the kind. They are seeking to reach the separate property upon the separate contract of Daniel Gibb, and the rule in question permits this to be done, how much soever it may be narrowed in its range.

4th. The doctrine in question contemplates a foray upon the separate estate at large, and has no application to [609] the case of a \*creditor attempting to enforce a vested lien upon specific property. Under no circumstances can a creditor with a specific lien be delayed in his remedy upon it, unless a case is made out against him within the doctrines applicable to the "marshaling of assets." (1 Sto. Eq. chap. 13.)

FIELD, C. J. delivered the opinion of the Court—COPE, J. concurring.

We have carefully considered the objections taken by the defendants to the complaints in these cases, and are of opinion that they are untenable. The brief of the counsel of the plaintiff satisfactorily answers them. The Reporter will give a full synopsis of the briefs of the learned counsel in the report of the cases.

The judgment is reversed, and the cause remanded for further proceedings in both cases; and inasmuch as the executor has died since the argument, the judgments will be entered as of the first day of May, that day being previous to his death. (*Black v. Shaw*, 20 Cal. 68.)

## DUTTON v. WARSCHAUER.

<sup>1</sup> **EJECTMENT—LANDLORD MAY APPEAR AND DEFEND.**—The action of ejectment must be brought against the actual occupant of the premises, if there be one. If such occupant be a tenant of another, the landlord may appear and defend in his name or be substituted in his place.

<sup>1</sup> **IDEM—SUBSTITUTION OF LANDLORD TO BE ENTERED OF RECORD.**—The appearance or substitution of the landlord should be entered of record, and only allowed upon notice to the parties. After it is once properly made, the tenant cannot interfere with any subsequent proceedings to the prejudice of the landlord.

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<sup>1</sup> Affirmed in *Hawkins v. Reichart*, 28 Cal. 536; cited as authority in *Valentine v. Mahoney*, 37 Cal. 394. See *Burke v. Tu. Mt. W. Co.*, 12 Cal. 407; *Noe v. Card*, 14 Cal. 609; *Fogarty v. Sparks*, 22 Cal. 148; *Owen v. Fowler*, 24 Cal. 192; *Lyle v. Rollins*, 25 Cal. 440; *Caldernood v. Brady*, 28 Cal. 98; *Dimick v. Deringer*, 32 Cal. 491. See also *Sampson v. Ohleyer*, 22 Cal. 200; *Wheelock v. Warschauer*, ante 309; *Same v. Same*, 34 Cal. 265; *Caldernood v. Brooks*, 28 Cal. 156; *Mahoney v. Middleton*, Jan. T. 1871.

- <sup>1</sup> **IDEM—PARTIES ON APPEAL.**—Where, without any order of record, the landlord, at the request of the tenant, appeared in fact and conducted the defense to judgment in the lower Court: *Held*, that it was too late to object in the Appellate Court to the want of the order; and that the landlord was entitled to the control of the appeal.
- <sup>2</sup> **MORTGAGE A MERE SECURITY.**—The doctrine respecting mortgages which prevails in this State is, that a mortgage is a mere security operating upon the property as a lien or incumbrance only, and is not a conveyance vesting in the mortgagee any estate in the land either before or after condition broken.
- <sup>3</sup> **IDEM.**—This doctrine was established, not merely from a consideration of the provisions of the Statute of 1851, but also from a consideration of the real object and intention of the parties in executing and receiving instruments of this kind, \*and as embodying the principles recognized generally in the [610] Courts of other States.
- <sup>4</sup> **IDEM.**—The provisions of the statute, however, led the Court to go beyond the decisions in other States adopting the equitable doctrine as to mortgages, and to carry that doctrine to its legitimate and logical result by regarding the mortgage as a security under all circumstances, both at law and in equity.
- <sup>5</sup> **IDEM.**—The character of the mortgage, as a mere security, is not changed by default in the payment of the debt secured, and payment after default operates as an extinguishment of the lien equally as payment at the maturity of the debt.
- POSSESSION BY MORTGAGEE.**—The interest of the mortgagee is not enlarged or affected by the fact that he is in possession under the mortgage.
- IDEM—LEGAL TITLE.**—A mortgagee after condition broken, whether in or out of possession, cannot convey the legal title, and his deed, as mortgagee alone, without a transfer of the debt, passes nothing.
- IDEM—RENTS AND PROFITS.**—When possession is taken by the mortgagee, after condition broken, by consent of the mortgagor, it will be presumed, in the absence of clear proof to the contrary, to be with the understanding that the mortgagee is to receive the rents and profits, and apply them to the debt secured; and, unless a limitation to the period of possession is fixed at the time, it will be considered as extending until the satisfaction of the debt.
- IDEM—MAY BE TRANSFERRED.**—The temporary possessory right thus acquired by the mortgagee may be transferred, and the transferee will be substituted to his position, and be subjected to the same liabilities. This, however, will not be effected by a deed, which does not purport to convey any possessory rights of the grantor, or his interest generally, but only such interest as he could convey as mortgagee, or by virtue of an express power from the mortgagor.
- POWER OF ATTORNEY NOT UNDER SEAL.**—A power to sell and convey land not under seal, and therefore insufficient to authorize the execution of a conveyance of the fee, is nevertheless sufficient authority for the execution of a contract of sale; and a deed made by the donee reciting the sale, and purporting, in pursuance of the power, to convey the fee, is a sufficient "note or memorandum" of such contract, and though inoperative as a conveyance is good as an agreement to convey.
- SALE OF LAND BY ATTORNEY.**—Where a purchaser, under a conveyance executed by an attorney having a power not under seal, pays the purchase money, and enters into possession, a Court of Equity will protect him, and parties claiming under him, against subsequent purchasers with notice from the grantor of the power.

<sup>1</sup> Affirmed in *Daubenspeck v. Platt*, 22 Cal. 336; *Grattan v. Wiggins*, 23 Cal. 26; *Heyland v. Badger*, 35 Cal. 413; commented on and approved in *Mack v. Wetzel*, 39 Cal. 255. See *Kidd v. Teeple*, 22 Cal. 261; *Wilson v. Brannan*, 27 Cal. 258; *Bludworth v. Lake*, 33 Cal. 264; *Jackson v. Lodge*, 36 Cal. 29; *Raynor v. Lyons*, 37 Cal. 453; *Hughes v. Davis*, 40 Cal. 120; *Williams v. Santa Clara Mining Assoc.*, 66 Cal. 201; See 4 Sawy. 235, 238; 82 Ind. 406.

\* POSSESSION TO PUT PURCHASER ON INQUIRY.—Open, notorious, and exclusive possession of real estate is sufficient to put a purchaser upon inquiry as to the interest, legal or equitable, held by the possessor.

\* *IDEM*—BY TENANT.—Such possession by a tenant is sufficient to put the purchaser upon inquiry as to the landlord's title. *Smith v. Dall*, 13 Cal. 510, overruled on this point.

### APPEAL from the Fourth Judicial District.

The defendant was, at the time of the commencement of the action, the tenant of Mrs. Wheelock. He notified [611] her of the \*action, and she appeared by counsel in the lower Court, and conducted the defense, but without being substituted as defendant, or becoming a party to the record. The judgment being for plaintiff, an appeal was taken at the instance of Mrs. Wheelock, but in the name of Warschauer, the defendant. Before the hearing, Warschauer filed a release of all errors, on which respondent moved to dismiss the appeal. The motion was argued and submitted in connection with the other points in the case.

The following are copies of the mortgage of April 13th, 1850, executed by Finley, Johnson & Austin to Meacham, and of the deed of July 5th, 1850, executed by Meacham to Joseph W. Finley, mentioned in the opinion of the Court:

#### [COPY OF THE MORTGAGE.]

“This indenture, made this thirteenth day of April, in the year of our Lord one thousand eight hundred and fifty, between John M. Finley, Charles H. Johnson, and Jos. W. Austin, of the county of San Francisco, in the State of California, of the first part, and R. Meacham, of the county and State aforesaid, of the second part: Whereas, the said parties of the first part, by their bond or obligation, duly executed, bearing date on the thirteenth day of April, in the year of

<sup>3</sup> Cited as authority in *Landers v. Bolton*, 26 Cal. 419; *Fair v. Stevenot*, 29 Cal. 491; *Smith v. Yule*, 31 Cal. 184; *Pell v. McElroy*, 36 Cal. 271; *Thompson v. Pioche*, Oct. T. 1872. See also *Stafford v. Lick*, 7 Cal. 489; *Daubenspeck v. Platt*, 22 Cal. 330; *Killey v. Wilson*, 33 Cal. 693; *O'Rourke v. O'Connor*, 39 Cal. 447; *Pac. L. M. Ins. Co. v. Stroup*, 63 Cal. 152; *Thompson v. Pioche*, 44 Cal. 516.

Title of grantees not affected by foreclosure after conveyance unless made parties, affirmed in *Carpentier v. Williamson*, 25 Cal. 161. See *Burton v. Lies*, ante 87, and note 2. Right of entry by mortgagor, considered in *Skinner v. Buck*, 29 Cal. 256. See *Grattan v. Wiggins*, 23 Cal. 16.

Eviction of tenant, cited and commented on in *Wheelock v. Warschauer*, 34 Cal. 268. See *Steinback v. Krone*, 36 Cal. 310; *Valentine v. Mahoney*, 37 Cal. 395.

our Lord one thousand eight hundred and fifty, stand bound unto the said party of the second part, his executors, administrators, or assigns, in the sum of twenty-four thousand dollars, current money, with a condition thereunder written for the payment of the sum of twelve thousand dollars, current money, on or before the twelfth day of June next ensuing, as by the said bond and condition may more fully appear.

"Now this indenture witnesseth, that the said parties of the first part, in consideration of the said debt or sum of twelve thousand dollars owing to the said party of the second part as aforesaid, and for the better securing the payment thereof to the said party of the second part, his executors, administrators, or assigns, according to the condition of the said bond; and also, in consideration of the further sum of five dollars, current money, to them, the said parties of the first part, by the said party of the second part, in hand well and truly paid, at and before the sealing and delivery of these \*presents, the receipt whereof is hereby ac- [612] knowledged by the said parties of the first part, have granted, bargained, and sold, released, and confirmed, and by these presents do grant, bargain, and sell, release, and confirm unto the said party of the second part, his heirs and assigns, all that lot or portion of land lying and being in the city of San Francisco, county and State aforesaid, being part of lot known on the plat or plan of the said city as number seventy-seven, (77,) which said part or portion herein conveyed is bounded as follows: Commencing on the south-west corner of lot number seventy-seven, and extending northwardly thirty feet in front on Stockton Street, and running back in depth twenty-five varas at right angles to the line of said street, having the same frontage and rear.

"To have and to hold the said lot or piece or portion of land, and every part and parcel thereof, with the buildings and appurtenances thereunto belonging to the said R. Meacham, his heirs and assigns, forever, to their own use and behoof.

"*Provided*, always, and it is the true intent and meaning of these presents, and of the said parties hereunto, that the said parties of the first part, their heirs, executors, or administrators, do and shall well and truly pay, or cause to be paid,

unto the said party of the second part, his executors, administrators, or assigns, the said full sum of twelve thousand dollars, current-money, on or before the twelfth day of June, in the year of our Lord one thousand eight hundred and fifty, without any deduction or abatement whatever, then and from thenceforth these presents, and every matter and thing therein contained, shall cease and be utterly null and void, anything therein to the contrary thereof in anywise notwithstanding.

"In witness whereof, the said parties of the first part have hereunto set their hands and affixed their seals the day and year first above written.

"JOHN M. FINLEY, [SEAL.]

"C. H. JOHNSON, [SEAL.]

"JOS. W. AUSTIN, [SEAL.]

"Signed, sealed, and delivered in the presence of

"GEO. GIBSON,

"W. O. HAMERSTINE."

[613] \*This mortgage was acknowledged and recorded on the thirteenth of April, 1850.

[COPY OF THE DEED.]

"This indenture, made this fifth day of July, 1850, between Randolph Meacham, of the city of San Francisco, of the one part, and Joseph W. Finley, of the same city, of the other part: Whereas, John M. Finley, Charles H. Johnson, and Joseph W. Austin, by a certain indenture dated the thirteenth day of May, 1850, did grant, bargain, sell, release, and confirm unto the said Randolph Meacham the premises hereinafter described and conveyed for securing the payment of the sum of twelve thousand dollars as therein particularly mentioned; and whereas the said principal sum being in arrear and unpaid, the said Randolph Meacham, under and by virtue of the said indenture, and of a certain authority in writing, signed by the said John M. Finley, Charles H. Johnson, and Joseph W. Austin, and dated the twenty-sixth day of June last, advertised the said described premises for sale by public auction on the second day of July instant, at which sale the said Joseph W. Finley, being the highest bidder, became the purchaser thereof, at the price of seven thousand eight hundred dollars.



"And this indenture witnesseth, that in consideration of the said sum of seven thousand eight hundred dollars, to the said Randolph Meacham, paid by the said Joseph W. Finley, at or before the sealing and delivery hereof, the receipt whereof, and that the same is in part payment of the said principal sum of twelve thousand dollars, he, the said R. Meacham doth hereby acknowledge, he, the said R. Meacham, *as such mortgagee as aforesaid, and under and by virtue of the said indenture and authority in writing hereinbefore recited*, hath granted, bargained, sold, released, and conveyed, and by these presents doth grant, bargain, sell, release, and convey unto the said Joseph W. Finley, his heirs, executors, administrators and assigns, all that lot or portion of land lying and being in the said city of San Francisco, being part of lot known on the plot or plan of the said city as number seventy-seven, which said part or portion hereby conveyed is bounded as follows:

\*"Commencing at the south-west corner of said lot [614] number seventy-seven, and extending northwardly thirty feet in front of Stockton Street, and running back in depth twenty-five varas, at right angles to the line of said street, having the same frontage and rear.

"To have and to hold the same, together with the buildings and appurtenances standing and being thereon or belonging thereto, unto the said Joseph W. Finley, his heirs, executors, administrators, and assigns, as fully and absolutely to all intents and purposes as the said R. Meacham, *under and by virtue of the said indenture and authority can and may convey and assure the same, but not further or otherwise*; and the said R. Meacham doth hereby for himself, his heirs, executors, and administrators, covenant and declare that he hath not in any manner charged, incumbered, or prejudicially affected the said premises hereinbefore described in title, estate, or otherwise howsoever.

"In witness whereof, the said R. Meacham doth hereto set his hand and seal, the day and year first above written.

"R. MEACHAM. [SEAL.]

"Signed, sealed, and delivered by the said R. Meacham in the presence of  
H. G. GORELIN."

This deed was acknowledged and recorded on the eighth of July, 1850.

*O. L. Shafter* and *S. Heydenfeldt*, for Appellant.

The defendant is in possession under the title of *Mrs. Joanna Wheelock*, and she has by confession all the title that passed to *Joseph W. Finley* by *Meacham's* deed to him, executed July 6th, 1850.

In the strictly legal aspects of the case, as contradistinguished from the equitable ones, the principal question is this, what estate passed to *Finley* by the deed of *Meacham*, above mentioned?

I. *Finley* by that deed became the owner of the demanded premises in fee simple absolute, both as against *Meacham* and as against *Finley, Johnson & Austin*. This result [615] will be argued \*upon two grounds, each of which is substantially or at least complexiously distinct from the other.

1st. At the time *Meacham* executed the deed in question, he was a mortgagee, in possession of the mortgaged premises, after condition broken, and therefore was in a position to convey the legal title to another, in his own name, subject always to the right of the mortgagor to redeem. This point is to be determined by the common law of England, as it stood on the thirteenth of April, 1850. Our present statute upon the subject of mortgage titles was not passed until the twenty-ninth of April, 1851, nine months after the deed to *Finley*. (*Greenl. Cruise, Tit. Mort.*; 1 *Hilliard on Morts.* 134; *Smith v. Smith*, 15 N. H. 55.) That this understanding of the rule of the English Common Law is not a mistaken one, see *McMillan v. Richards*, 9 Cal. 407.

But it is suggested that *Meacham* was in possession as tenant of the mortgagors, and that he paid rent as such. The case shows simply that *Meacham* went into possession after breach of condition, by the consent of one of the mortgagors, and that when he thereafter came to compute the amount of their indebtedness to him in connection with a personal action brought to recover it, he made an abatement on the score of his occupation of the mortgaged premises. This fact consists perfectly with his position of mortgagee in possession; as such

he was, on well settled principles, liable to account as bailiff or receiver, and the abatement named was but a mere recognition of the liability.

2d. Meacham was not only a mortgagee in possession after breach of condition, but aside from all question of possession he had a power authorizing him to sell and convey in his own name, and therefore his own deed suffices to pass the title. As to the existence of such power, it is established by the direct testimony of Meacham, and with as much precision as the nature of the case will admit. The power is recited in the deed to Finley, a document nearly contemporaneous, and this recital is notice of its existence to all persons. (*Jackson v. Neely*, 10 Johns. 374.)

The long acquiescence of the parties interested to disprove its existence or its completeness, in the face of a continued adverse possession, is an important circumstance to be considered in connection with the other proofs. [616] (14 Vt. 268; 1 Caines on Error, 18, 21; Mathews' Pres. Ev. 197, *passim*.)

Assuming the existence and completeness of the power, Meacham properly executed the deed to Finley in his own name. (4 Kent, 124; 1 Caines' Cases on Error, 15; 2 Mason, 249; Story Ag. secs. 150, 164.)

II. At the worst, Meacham was lawfully in possession of the property by the license of the mortgagors, and his deed to Finley substituted the latter to his position, and so on through the whole descending series to Warschauer inclusive. As Meacham's possession was no ouster, so Warschauer's possession is not. There should have been a demand and refusal in advance of suit. A mere claim of title is no ouster of real property or conversion of personal property: conversion and ouster go upon the same principle, and mere words, whether spoken or written, can accomplish neither the one nor the other. It may be true that at common law a conveyance by a mortgagee out of possession may give to his grantee no right of entry, but while the mortgagee is in possession by license of the mortgagor, he is in a position to communicate his own admitted possessory rights to another.

But at the time of this conveyance by Meacham, the deed of a mortgagee out of possession was good to pass the legal

title; for, by the thirty-fourth section of the Act of April 16th, 1850, entitled "An Act concerning Conveyances," it is provided that, "Any person claiming title to any real estate may, notwithstanding there may be an adverse possession thereof, sell and convey his interest therein in the same manner and with the same effect as if he was in actual possession thereof." Meacham, therefore, even if not in possession, had the power to convey whatever interest he held.

But the *prima facie* title of the plaintiff is resisted not merely upon the ground of superior legal right, but upon equitable grounds.

1st. The answer discloses a good, equitable defense as against Finley, Johnson & Austin. We shall forbear from arguing this question, and content ourselves with giving citations. (*Salmon v. Hoffman*, 2 Cal. 138; *Francis v. Crane*, 15 Id. 12.)

2. Plaintiff took his deed from Johnson, with notice in fact; and \*Spence & Bowie took their deed from Finley, Johnson & Austin, with like notice.

The adverse possession commenced with J. W. Finley, on the sixth of July, 1850, and has been steadily perpetuated from that day to the present. It has always been actual, visible, and notorious, and never more so than at the time when Spence & Bowie took the firm interest, and when the plaintiff bought of its surviving member, Johnson. (*Hunter v. Watson*, 12 Cal. 363; *Smith v. Dall*, 13 Id. 510.)

By the last case, when the owner is sued he cannot prove notice in fact by the possession of his tenant. It decides nothing but that; but the decision goes upon the principle that any defendant in ejectment having an estate in the land to defend, which estate was not manifested of record at the time when the plaintiff took his deed from the party who previously created the estate in the defendant, may show notice in fact of the existence of the estate by proof of personal possession in its owner at the point of time when the adverse deed was given.

But the case of *Smith v. Dall* it is submitted is not law, and must be overruled. It is the opinion of only one Judge. The doctrine is derived exclusively from a dictum in 2 Sugden on Vendors, 558, which has no support from any previous

authority. Judge Story, while he unnecessarily adopts the doctrine in the case of *Flagg v. Mann*, 2 Sum. 555, admits that there is no authority for the position except the great experience and acknowledged ability of the author

The authorities cited by Judge Story as far as they are reliable do not sustain the principle, and diligent research has failed to find any sanction for it.

On the other hand the opposite doctrine has been held, and is the rule in at least five of the United States where the question has been passed on. The following cases are referred to: *McCorkle v. Amarine*, 12 Ala. 17, 23; *Diehl v. Page*, 2 Greens. Ch. 143, N. J.; *Baldwin v. Johnson*, Saxton, N. J. Ch. 441; *Pitman v. Gates*, 5 Gilman, 186; *Pritchard v. Brown*, 4 N. H. 397; *Hanley v. Morse*, 32 Maine, 287; *Vezio v. Parker*, 23 Id. 171. And it never was doubted that possession was notice of \*the tenant's equity, and therefore [618] the defendant as tenant should be protected. (*Troup v. Hurlburt*, 10 Barb. 354; *Taylor v. Hibbert*, 2 Vesey, 440; *Weem v. Neill*, 13 Id. 120.)

*J. D. Bristol*, for Respondent.

I. The defendant has released all errors, and the appeal should therefore be dismissed. Under the practice in this State and the decisions of this Court, the tenant in possession is the only proper party defendant, in ejectment. Mrs. Wheelock, if she had so desired, had the right to have herself substituted on the record as defendant, and could have come in and defended the action in the Court below in her own name, and thus have protected herself against any steps which her tenant might be inclined to take to her prejudice. But we insist that she cannot now become a party to this record in any way. If her tenant has done anything wrong in the defense of this action, she has a remedy against him. Warschauer is the only party defendant and appellant, and being such, has a legal right to release any error that may have been committed; *non constat* but appellant may have bought the titles of both plaintiff and Mrs. Wheelock since the trial, and does not wish to prosecute his appeal.

II. Appellant contends that Meacham was a mortgagee in possession after condition broken, and that he entered for

breach of condition, and had good right to convey in his own name, and that therefore defendant has the legal title. We answer that a mortgagee can convey no title. He has none to convey. (*McMillan v. Richards*, 9 Cal. 365; *Johnson v. Bronson*, 19 J. R. 326; *Godfrey v. Caldwell*, 2 Cal. 409.) This last case was decided before the passage of the Civil Practice Act in 1851. But appellant says that he had title in equity. He insists that Finley had paid money to Meacham which went in part satisfaction of the mortgage debt, and that he holds under Finley, and therefore has an equitable title, and that his possession was notice to plaintiff of his title.

No assignment of the debt or mortgage, or any part thereof, took place. Meacham retains the debt, and sues on it. (See *Peters v. Jamestown Bridge Co.*, 5 Cal. 334.) A deed

[619] from the mortgagee does not even convey the mortgage. (*Ord v. McKee*, \*5 Cal. 515.) As to the alleged power of attorney from the mortgagors to Meacham to sell and convey, it is sufficient to say that it was not under seal, and therefore could not confer any authority to execute the deed to Finley; and if the power had been under seal, it would not have authorized a deed in the name of the attorney. (Notes of Hare & Wallace, in 1 Amer. Lead. Cases, 601.)

III. The plaintiff is a *bona fide* purchaser for value without notice of any equities on the part of the landlord of the defendant. He is therefore entitled to recover, having the legal title. It is not claimed that the plaintiff had any actual notice, and no constructive notice could arise from the records, as there was no conveyance out of Finley, Johnson & Austin. Defendant relies upon constructive notice from the possession of the defendant. Notice must be clearly established to overturn a legal title. It is not the case of a good deed not recorded, and the possession going with the deed. There is no pretense that Finley, Johnson & Austin ever made any deed to this property. It cannot be contended that defendant was in under an equity which could not in its nature be recorded. The power was an instrument which could have been acknowledged and recorded, and any contract or deed made under it could have been likewise recorded. This rule of notice of an equity can never apply when the party

invoking it has neglected to obtain a proper title, which, as in this case, could have been obtained. In other words, equity will not protect a man who prefers to neglect his own interest.

FIELD, C. J. delivered the opinion of the Court—COPE, J. and NORTON, J. concurring specially.

The action of ejectment must be brought against the actual occupant of the premises, if there be one. (*Garner v. Marshall*, 9 Cal. 268.) If such occupant be a tenant of another, the landlord may appear and defend in his name, or be substituted in his place. But such appearance or substitution should be entered of record, and only allowed upon notice to the parties. After it is once properly made, the tenant cannot interfere with any subsequent proceedings to the prejudice of the landlord. In the present case the defense was made by the landlord at the request of the tenant.

\*Judgment having passed against the tenant, the [620] landlord took an appeal in his name. Thereupon the tenant executed a release of errors, and upon it the plaintiff moves for a dismissal of the appeal.

This motion must be denied. The right of the landlord to conduct the proceedings, after having been once allowed to appear and defend in the tenant's name, extends to the final disposition of the case, and is not limited to the proceedings in the lower Court. (*Kellogg v. Forsyth*, 24 How. 186.) It is true, no order was entered allowing the landlord to appear and defend, but as the defense was in fact conducted by him to judgment at the request of the tenant, it is too late to object in this Court for the want of such order: if it were otherwise we would allow the order to be entered *nunc pro tunc*.

The plaintiff and the landlord of the defendant both deraign their title from a common source—from Finley, Johnson & Austin. These parties owned the premises in fee on the thirteenth of April, 1850. On that day they executed a mortgage thereon to one Meacham, to secure their bond to him for \$12,000, payable on the twelfth of June following. The mortgagors made default in the payment of the bond, and by permission of one of them Meacham went into possession of

the premises. Whilst he was in possession the mortgagors executed to him a power in terms authorizing him to sell and convey the premises in his own name. In pursuance of the terms of this power, he sold and conveyed the premises to one Finley, for the consideration of \$7,800. The deed bears date July 6th, 1850, and recites the power. Through this deed the landlord of the defendant traces his title, and the principal question for determination relates to the sufficiency of the title thus acquired to resist a recovery of the plaintiff, claiming through subsequent deeds, taken with only such notice of the landlord's interest as could arise from the possession of his tenant.

The defendant takes two positions: first, that the legal title to the premises passed by the deed; and second, if this be not sustained, then that an equitable title was created, which, having been followed by possession, is sufficient to defeat the action.

The transfer of the legal title is asserted on two grounds: one, that Meacham, as mortgagee in possession after  
[621] condition broken, \*was clothed with the fee; and the other, that he was invested with authority to convey the whole estate by the special power from the mortgagors.

The first ground proceeds upon the common law doctrine of mortgages, which does not prevail in this State. At common law, a mortgage is considered as a conveyance of a conditional estate, which becomes absolute upon breach of the condition. But "in this State," as we said in *Goodenow v. Ewer*, 16 Cal. 467, "a mortgage is not regarded as a conveyance vesting in the mortgagee any estate in the land, either before or after condition broken. It is regarded, as in fact it is intended by the parties, as a mere security, operating upon the property as a lien or incumbrance only. Here, the equitable doctrine is carried to its legitimate result. Between the view thus taken and the common law doctrine—that the mortgage is a conveyance of a conditional estate—there is no consistent intermediate ground. In those States where the mortgage is sometimes treated as a conveyance, and at other times as a mere security, there is no uniformity of decision. The cases there exhibit a fluctuation of opinion between equitable and common law views of the subject, and a hesitation by the



Courts to carry either view to its legal consequences. In *McMillan v. Richards*, 9 Cal. 365, we had occasion to consider the subject at great length, and to observe upon the diversity existing in the adjudged cases. We there asserted, what had previously been held in repeated instances, the equitable doctrine as the true doctrine respecting mortgages, and have ever since applied it under all circumstances. (See *Nagle v. Macy*, 9 Cal. 426; *Haffley v. Maier*, 13 Id. 13; *Koch v. Briggs*, 14 Id. 256; *Clark v. Baker*, Id. 612; *Johnson v. Sherman*, 15 Id.) When, therefore, a mortgage is here executed, the estate remains in the mortgagor, and a mere lien or incumbrance upon the premises is created."

The counsel of the defendant do not controvert the doctrine thus stated as applicable to mortgages executed since the Statute of 1851, but appear to consider that it was not intended to embrace mortgages previously executed. In this view they are only partially correct. The doctrine was established not merely from a \*consideration of [622] the provisions of the statute, but also from a consideration of the real object and intention of the parties in executing and receiving instruments of this kind. In truth, mortgages had long before lost, for nearly all purposes, their common law character as conveyances, and been regarded as transactions by which security was furnished by a pledge of real estate for the payment of debts. Courts of Equity from an early date had so regarded them, and Courts of Law, by "a gradual and almost insensible progress," as Kent observes, had adopted the equitable view of the subject, though, we may add, not always carrying the equitable doctrine to its logical result. (4 Kent, 160.) The equitable doctrine had prevailed to such an extent, that in nearly all the States the interest of the mortgagee was treated by the Courts of Law as real estate only so far as it was necessary for the protection of the mortgagee, and to give him the full benefit of his security. Thus, in *Ellison v. Daniels*, 11 New Hampshire, 274, the Court said: "The right of the mortgagee to have his interest treated as real estate extends to and ceases at the point where it ceases to be necessary to enable him to protect and to avail himself of his just rights, intended to be secured to him by the mortgage. To enable the mortgagee to sell and convey his

estate is not one of the purposes for which his interest is to be treated as real estate. There is no necessity that it should be so treated for that purpose. That can be equally well effected in the usual way of assigning and transferring the debt secured by the mortgage. The mortgagee is secured and fortified in all his rights without the adoption of any such principle, and the plain purposes of a mortgage forbid it. The object of the mortgage is the security of the debt; and it is obvious reason that he only who controls the debt should control the mortgage interest." In that case the demandant was mortgagor, and the tenant claimed title under the mortgage by various mesne conveyances executed after the law day, and it was held, in accordance with the views expressed in the above citation, that nothing passed to the tenant. So, in *Jackson v. Willard*, 4 Johns. 41, it was held that lands mortgaged could not be sold under execution against the mortgagee, though the estate, according to the terms of the instrument, had become absolute. And in [623] \**Johnson v. Bronson*, 19 Johns. 325, a mortgagor in fee sustained ejectment against the grantee of the mortgage, the Court holding the assignment of the interest of the mortgagee in the land, without an assignment of the debt, a nullity. (See also *Ewer v. Hobbs*, 5 Met 3; *Howard v. Robinson*, 5 Cush. 123, and *Hilliard on Mort.*, vol. 1, ch. 13, and cases there cited.)

It was from a consideration of the character of the instrument, as settled by these decisions and the modern cases generally, that we were induced to adopt the equitable doctrine as the true doctrine; and it was from a consideration of the provisions of the statute which led us to go beyond those cases, and carry the doctrine to its legitimate and logical result, and regard the mortgage as a security under all circumstances, both at law and in equity. Mortgages, therefore, executed before the statute, can only be treated as conveyances when that character is essential to protect the just rights of the mortgagee; mortgages since the statute are regarded at all times as mere securities, creating only a lien or incumbrance, and not passing any estate in the premises. (*Fogarty v. Sawyer*, 17 Cal. 592; *Lord v. Morris*, 18Id. 487, 488.)

As the mortgage is a mere security, it is plain that default

in the payment of the debt secured cannot change its character. Payment after default will operate as an extinguishment of the lien equally as payment at the maturity of the debt." "Indeed, in those Courts, with some few exceptions, where the common law view of mortgages is the most strictly adhered to, payment of the debt," as we said in *McMillan v. Richards*, "is held to revest the estate without a reconveyance in the mortgagor, though it is difficult to see upon what principle. If the mortgage is a conveyance after default, it must be equally so before; the only difference being that, in the one case, the estate conveyed is conditional, and in the other, absolute. If, after default, the estate be absolute, it is not easy to perceive how the grantee can be divested without deed under the Statute of Frauds; and yet, according to the general doctrine of the modern cases, payment has that effect." (9 Cal. 411.) This general doctrine is inconsistent with the theory that the mortgage is a conveyance after default, but is consistent with the theory that it is only an instrument of security.

\*Was the interest of the mortgagee affected by the [624] fact that he was in possession of the premises?

According to the language of many of the adjudged cases in other States, the taking of possession after condition broken is considered as in some way enlarging the rights of the mortgagee. Thus, in New York, he is said to have before possession only a chattel interest, but after possession taken, to have the title of the mortgagor. For this reason the mortgagee of a term in possession is there held liable as assignee upon the covenants of a lease, but is not held liable if out of possession. (*Astor v. Hoyt*, 5 Wend. 603.)

Upon this point the observations of Mr. Chief Justice Hosmer of the Supreme Court of Connecticut, in *Clark v. Beach*, 6 Conn. 161, appear to us to have great force, though he differed with his associates. In that case a mortgage deed was admitted in evidence to sustain the defendant's plea of title. The mortgagee was in possession, and the law day had expired. The Chief Justice was of opinion that the deed should have been rejected; and in reply to the statement on the argument that the mortgagee's possession had enlarged his title, said: "In my judgment, a more gratuitous assertion

cannot be made. There is nothing in the nature of this fact *per se* that adds to the mortgagee's title, or the title of any other person. Before entry, the grantee of land, except where possession is requisite to commence a right, has title not enlarged by subsequent occupation; as such occupation confers not any right, but merely gives the enjoyment of a right antecedent. If the supposition, which neither principle nor analogy countenances, were true, that the possession of the mortgagee gives him seizin of the freehold, he would always be seized, for he would never fail to enter. After possession, just as before, the estate mortgaged is a pledge only; the relation of creditor and debtor exists; the equity of redemption is unimpaired: or, if the law day has not elapsed, the payment of the debt annihilates all the rights of the mortgagee, and everything is in *statu quo*. All this is true until foreclosure is effected. Then it is that the mutual relation of the parties becomes changed. There is no longer a mortgage or pledge, a creditor or debtor, a mortgagor or mortgagee, or an equity of redemption. The mortgaged premises, by a legal appropriation thereof, are lost [625] \*to the mortgagor forever, and the mortgagee has become tenant in fee simple."

But it is not necessary to argue the point upon principle, for it has been expressly decided in this Court. In *Johnson v. Sherman*, 15 Cal. 287, an assignment was executed to the defendant of a leasehold interest in certain premises as security for a loan of money. The assignment was therefore in fact a mortgage. The defendant took possession, and continued in possession after the loan made had matured, and the question presented was whether, as mortgagee of the term in possession, he was liable upon the covenants of the lease. According to the authorities of New York, to which we have already referred, a mortgagee of a term out of possession is not thus liable, because he has then only a chattel interest; but in possession is held liable, because he is then considered to have the title of the mortgagor. The point for determination, therefore, was whether in this State the fact of possession affected the interest of the mortgagee. The Court held that it did not. After stating that default in payment did not change the character of a mortgage, the Court said: "Nor

can possession under the mortgage affect the nature of the mortgagee's interest; it does not abridge or enlarge his interest, or convert what was previously a security into a seizin of the freehold; it does not change the relation of creditor and debtor, or impair the estate of the mortgagor, but leaves the rights and interests of the parties exactly as they existed previously. Possession taken by consent of the owner, or by contract with him, may confer rights as against third parties, but they are independent and distinct from any rights springing from the mortgage, from which they derive no support."

It follows, from the views we have expressed, that Meacham, as mortgagee after condition broken, whether in possession or out of possession, could not convey the legal title. He did not hold it. He held, by virtue of the mortgage, only a lien upon the premises, and that was a mere incident of the debt. His deed, therefore, as mortgagee alone, without a transfer of the debt, passed nothing. (See cases cited above.)

Although a mortgage in this State of itself confers no right of possession, yet, when possession is taken by the mortgagee after \*condition broken, by consent of the [626] mortgagor, it will be presumed, in the absence of clear proof to the contrary, to be with the understanding that the mortgagee is to receive the rents and profits, and apply them to the payment of the debt secured. There is, indeed, no other good reason why the mortgagee should be let into possession in preference to any other party. And unless a limitation to the period of possession is fixed at the time, it will be considered as extending until the satisfaction of the debt. Having thus entered, the mortgagee can hold against the mortgagor, and all others, until such satisfaction is obtained. And though the legal title to the premises is not held, and as a consequence cannot be conveyed by the mortgagee, the temporary possessory right thus acquired may be transferred. The transferee will be substituted to his position, and be subjected to the same liabilities—that is to say, the rents and profits received by the transferee will be treated as received by the mortgagee, and applied to the discharge of the debt. (*Smith v. Smith*, 15 N. H. 55.)

In the present case the mortgagee went into possession by consent of one of the mortgagors, and it would seem without

objection from the other mortgagors; but he did not convey or attempt to convey any possessory rights which he may have thus acquired, or his interest generally. His deed only purports to transfer such interest as he could convey as mortgagee, and by virtue of the power already referred to from the mortgagors.

The question then arises as to the effect of the conveyance as executed under the power. The testimony of the mortgagee as to the contents of the power, for the instrument itself was lost, shows that in terms it authorized him to sell and convey the premises in his own name and apply the proceeds to the payment of the debt, but it fails to show positively that the power was under seal. The mortgagee testifies that he has no distinct recollection whether the power was under seal or not, but thinks that it was sealed, as he was in the habit of putting a seal to all instruments connected with the transfer of real estate. He was an auctioneer at the time, and frequently sold real estate. The presumption from this habit, if any presumption could be indulged at all, would be that the power in question was sealed. The evidence [627] clearly does not warrant the finding of the referee that it was not under seal. But as the case must go back for a new trial upon the last proposition of the appellant, it is unnecessary to express any opinion, whether if the power were in fact under seal, the conveyance from Meacham in pursuance of it was sufficient to pass the legal title. Assuming that it was not under seal, and that therefore it was insufficient to authorize the execution of the conveyance of the fee, it was sufficient to authorize the execution of a contract of sale. And the instrument in question, reciting the sale, is a sufficient "note or memorandum" of such contract; in other words, if the deed executed was inoperative as a conveyance, it was good as an agreement to convey. And the purchaser having paid the purchase money, and entered into possession of the premises, a Court of Equity will protect him and parties claiming under him against subsequent purchasers with notice. This protection the Court will afford by enjoining any interference with the premises on the part of the adverse claimants, or by directing a conveyance of the title from them, or in such other manner as will most effectually quiet the

possession. The inquiry then arises, whether the plaintiff purchased the legal title—treating the instrument executed by Meacham as a mere agreement to convey—with notice of the equity of the landlord of the defendant. The plaintiff traces his title by conveyance from the surviving assignee of Finley, Johnson & Austin, and from the surviving member of the firm. On the fifteenth of July, 1850, Finley, Johnson & Austin, being unable to pay their debts, made a general assignment of all their real and personal property to Spence & Bowie upon certain trusts. On the second of March, 1859, Johnson, the sole surviving member of the firm of Finley, Johnson & Austin, executed a deed of the premises in controversy to the plaintiff. On the twenty-first of March, 1859, Spence, the sole surviving trustee under the assignment, also executed a deed of the same premises to the plaintiff. At the time the assignment in July, 1850, was made, Finley, the purchaser from Meacham, was in the open, notorious, and exclusive possession of the premises; and at the time the two deeds were executed to the plaintiff the defendant was in like possession. There is no doubt that this possession was sufficient to put the plaintiff upon \*inquiry [628] as to the interest, legal or equitable, which the defendant held. (*Lestrade v. Barth*, 19 Cal. 660; *Hunter v. Watson*, 12 Id. 404; *Pritchard v. Brown*, 4 New Hamp. 404.) But when the plaintiff ascertained that the defendant was a tenant under Wheelock, was he bound to extend his inquiry to the interest of the landlord—in other words, was the possession of the tenant notice of the landlord's title? In *Smith v. Dall*, 13 Cal. 510, this question was answered in the negative by Mr. Chief Justice Terry, but as there was only a special concurrence in the judgment in that case, the opinion filed by him is not an authoritative statement of the law binding upon us. The opinion was based upon a dictum of Sugden, and observations in *Flagg v. Mann*, 2 Sumn. 555, where Mr. Justice Story, in adopting the view of Sugden, substantially admits that there is no authority for the position, except the great experience and acknowledged ability of the author. To our minds a persuasive argument against the doctrine is found in the statement by Sugden of the consequences to which it would lead. "Therefore," he says, "if a person equitably

entitled to an estate let it to a tenant who takes possession, and then the person having the legal estate sells to a person who purchases *bona fide*, and without notice of the equitable claim, the purchaser must hold against the equitable owner, although he had notice of the tenant being in possession." (2 Sug. on Vendors, 558.)

On the other hand, the opposite doctrine is asserted or assumed to be law in numerous cases. (*Pitman v. Gates*, 5 Gilm. 186; *Baldwin v. Johnson*, N. J. Ch. 441; *Diehl v. Page*, 2 Greens. Ch. 143; *Hanley v. Morse*, 32 Maine, 287; *Vezio v. Parker*, 23 Id. 171.) And it is not easy to give to the fact of possession any influence as notice without making it notice of all such matters as a prudent man, desirous of purchasing the property, would naturally inquire about respecting the title. Ascertaining that the possession of the occupant is that of a tenant, he would in the ordinary course of things proceed to inquire as to the title of the landlord.

The judgment must be reversed, and the cause remanded for further proceedings; and it is so ordered

[629] \*NORTON, J.—I agree with the opinion of the Chief

Justice upon the point that the instrument executed by Meacham was a sufficient agreement in writing for a sale of the premises by his principals, and that the defendant, being in possession by permission of those principals, in consequence of such instrument being executed, and having paid the purchase money, is entitled to be protected by the equity powers of the Court from an action of ejectment by those principals or those claiming under them, until, at least, an opportunity may be had to acquire the legal title.

I also agree that the possession by the defendant as tenant was notice to put the plaintiff at the time of his purchase on inquiry, and was thus sufficient to charge the plaintiff with notice of the equitable rights of the landlord, under whom the defendant held.

As the case must turn upon these two points, I do not deem it necessary to express an opinion upon the other matters which are discussed by the counsel.

I concur in the decision that the judgment should be reversed, and the cause remanded.



COPE, J.—I concur in the judgment of reversal, but do not consider it necessary to pass upon some of the questions discussed in the opinion of the Chief Justice.

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### GIBBONS *v.* PERALTA *et al.*

**DECREE REMOVING CLOUD ON TITLE.**—A decree pronouncing that a conveyance is fraudulent and void has the effect to remove any cloud resulting from its execution without an express direction that it be set aside.

**IDEM—INJUNCTION.**—Some two hundred persons, of whom plaintiff was one, claimed each separate parts of a tract of land called the “Encinal,” deriving their several titles from a common source, and all through a deed of the whole tract from Peralta to Hays. Plaintiff brought the action for himself and on behalf of the others, whose titles were similarly situated, for the purpose of obtaining equitable relief against certain subsequent conveyances of the Encinal made by Peralta, alleged to be fraudulent, and to constitute a cloud upon the title derived through the deed to Hays, and asked, as a portion of the relief, a perpetual injunction against any further alienations by the fraudulent grantees (defendants.) The decree pronounced the subsequent conveyances fraudulent \*and void, [630] and granted the injunction asked as to the plaintiff’s separate portion of the land, but not as to that of the others for whom he sued: *Held*, on appeal by plaintiff from this decree, that it was not in this respect erroneous—that there was no such community of interest between the plaintiff and those whom he represented in the action as entitled him to an injunction in their favor.

#### APPEAL from the Fourth Judicial District.

On the thirteenth day of March, 1852, Vincente Peralta, being the owner of a tract of land, situate in Alameda County, called the “Encinal of Temaschal,” embracing a part of the present city of Oakland, conveyed the same by deed to John C. Hays and others. This deed was not acknowledged or recorded. Plaintiff derives title to a portion of the tract by mesne conveyances from Hays and others.

On the seventeenth day of September, 1857, Peralta, by quitclaim deed, conveyed the same premises to Francisco Galindo, who, on the twenty-fourth of September, 1858, conveyed the same to Juan S. Pacheco. At the time of these sales plaintiff was in actual possession of the tract conveyed to him, and both Galindo and Pacheco knew at the time of their respective purchases of the unrecorded deed from Peralta to Hays and others.

The action is brought to remove from the title derived through the deed to Hays and others the cloud created by the subsequent conveyances to Galindo and Pacheco, both of whom, together with Peralta, are made defendants. The plaintiff states in his complaint that the "Encinal" tract is now owned in small parcels by about two hundred persons, who all derive their title in the same manner as himself—from Peralta through the deed to Hays and others of October 13th, 1852—and who have like claims with himself to equitable relief; that the parties being thus numerous, and the question one of common interest to many persons, he therefore sues for himself and on behalf of all others interested in the same manner.

The relief prayed for is that the deed from Peralta to Galindo be delivered up to be cancelled; that Pacheco be compelled to execute to himself and to the other purchasers from Hays a quitclaim deed to their respective parcels; [631] that Peralta be compelled to \*acknowledge the deed of October 13th, 1852, or to execute a new one; and that each of the defendants be enjoined from any further attempts at alienating or incumbering any portion of the tract conveyed by the deed of Peralta to Hays.

The Court found the facts in favor of plaintiff, and entered up the following decree:

"It is ordered, adjudged, and decreed, that the several sales and conveyances, to wit: by Vincente Peralta to Francisco Galindo, made and executed on the seventeenth day of September, 1857, are fraudulent, null, and void, as to the plaintiff and those in whose behalf he sues; and by Francisco Galindo to Juan S. Pacheco, made and executed on the twenty-fourth day of September, 1858, were and each of them are likewise fraudulent and void as to the plaintiff and those claiming under him, so far as they in any manner affect the land of plaintiff as described in his complaint. And it is further ordered, adjudged, and decreed, that the said defendants, Galindo, Peralta, and Pacheco, be and they are hereby perpetually enjoined from disposing of, alienating, incumbering, or conveying any portion of the land of plaintiff as herein described; and that the defendants pay the costs incurred by the plaintiff herein, amounting to one hundred and ninety-one dollars and seventy-five cents."

From this decree the plaintiff appeals, assigning as error that it does not afford adequate relief.

*H. P. Irving*, for Appellant

The relief granted by the Court was not broad enough to answer the requirements of the bill and the proofs. The Court decreed that the deeds sought to be set aside, to wit: the deed from Peralta to Galindo, and from Galindo to Pacheco, were fraudulent and void as to the plaintiff and those for whom the suit was brought, and yet refused to grant an injunction, so as to prevent the sale of the lands of the unnamed plaintiffs by the defendants. In other words, the Court declared the deeds void as to the unnamed plaintiffs as well as to the named plaintiff, and granted an injunction as to the latter only.

The bill is filed under the fourteenth section of the Practice Act, \*and states as strong a case as could [632] possibly be presented. It is precisely a case where the question is one of a general or common interest of many persons, and where the parties are numerous, and it is impracticable to bring them before the Court. This statute is perhaps broader in its provisions than the law as laid down and practiced by Courts of Equity in cases of this sort.

The fraudulent deeds operated as a general cloud upon all the land embraced within the line of the Encinal, which is the same land that was conveyed by Peralta to Hays and others. It would be extremely inconvenient, and in fact ruinous, to the parties, that every lot holder in the city of Oakland should be compelled to institute a separate suit for the purpose for which this suit is now instituted.

Upon the facts found, the defendants should have been enjoined from selling any of the land within the line of the Encinal and described in the deeds. Thus, general relief would have been given to all the parties, not only the named, but the unnamed plaintiffs.

The decree is also erroneous, in not ordering that Vincente Peralta acknowledge the original deed executed by him to Hays and others in proper form, in order that the same may be used as evidence.

*O. C. Pratt*, for Respondents.

COPE, J. delivered the opinion of the Court—FIELD, C. J. concurring.

The plaintiff sues on behalf of himself and others, residents and property holders of the city of Oakland, to set aside certain conveyances operating as a cloud upon the title to the tract of land occupied by the city, and to obtain an injunction, etc. The Court below entered a judgment declaring the conveyances fraudulent and void, and enjoining the defendants from future alienations in respect to the land of the plaintiff, the relief in this particular being confined to the plaintiff alone. The plaintiff appeals, and contends that the judgment is not such as the pleadings and the evidence in the case entitled him to.

He objects that the conveyances are not expressly [633] set aside; but the judgment determines their invalidity, and the effect is to remove the cloud resulting from their execution. We are of opinion, therefore, that the objection is not well taken, and that the judgment secures to the parties concerned all the plaintiff asks in respect to the conveyances.

The only further objection is that the injunction is limited in its operation to the land of the plaintiff, and we regard this objection as untenable also. So far as this branch of the case is concerned, it is sufficient to say, generally, that there is no such community of interest between the plaintiff and those whom he represents in the action as entitles him to an injunction in their favor.

We adhere to the judgment of affirmance previously entered.

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ROWE *et al.* v. BACIGALLUPPI *et al.*

**MISJOINDER OF PARTIES—OBJECTION HOW TAKEN.**—A misjoinder of parties plaintiff must be objected to by demurrer or answer, and cannot in the absence of such objection be made a ground for nonsuiting such of the plaintiffs as show themselves entitled to recover.

**TENANT IN COMMON MAY RECOVER IN EJECTMENT.**—One tenant in common in a mining claim may, as against mere trespassers, recover in ejectment the entire claim.

**SAME.**—In an action brought by several plaintiffs to recover a mining claim the answer, without alleging any misjoinder, denied plaintiffs' title and asserted an independent and better title in defendants, and the proofs showed that some of plaintiffs had no interest, and that others of them had a title superior to that of defendants as tenants in common with persons not made parties: *Held*, that those of plaintiffs thus showing title should recover of defendants the entire premises.

### APPEAL from the Sixteenth Judicial District.

The plaintiffs (seven in number) sued to recover a mining claim, averring in their complaint title and right to possession in themselves and an entry and ouster by defendants.

The answer denied the plaintiffs' title, admitted possession in defendants, and asserted their right to possession by virtue of an independent and better title.

Plaintiffs proved on the trial that a number of persons, composing what was commonly called the "Morgan Company," located the claim in 1852, and that it was [634] afterward worked and possessed by persons claiming to be members of that company down to the time of the eviction by defendants, in 1859, and that W. S. Rowe, one of the plaintiffs, was also one of the original locators and still retained his interest. The other plaintiffs were not original locators, and as to most of them there was no proof showing that they had ever acquired any interest in the claims.

Defendants moved for a nonsuit on the following ground: "That the claim in dispute was located, owned, and in the possession of other parties (except plaintiff Rowe) than the plaintiffs, and that plaintiffs have not shown any sale or transfer by deed, bill of sale, or otherwise, from the original owners to themselves."

The Court granted the motion and entered judgment accordingly, from which the plaintiffs appeal.

*H. P. Barber*, for Appellant.

1. By section forty-five of the Practice Act objection to a misjoinder or nonjoinder of parties not apparent on the record must be taken by answer, or "the defendant shall be deemed to have waived the same." (1 Cal. 175; 4 Id. 313; 6 Id. 164; 16 Id. 557.)

II. The plaintiff Rowe is admitted to have been in actual possession from 1853 up to 1859, the time of the eviction. His possession was long anterior to that of defendants, and as no evidence was given by them tending to show any right of possession it is difficult to conceive why he was not entitled to recover the possession of the entire premises. (*Touchard v. Crow*, 20 Cal. 150; *Clark v. Huber*, Id. 196.)

He was a tenant in common, and the possession of one tenant in common is the possession of all. (*Waring v. Crow*, 11 Cal. 366.) And ejectment under our system is a mere possessory action. (*Yount v. Howell*, 14 Cal. 466.)

*Caleb Dorsey*, for Respondents.

Appellants contend that if any of the matters stated in section forty of the Practice Act do not appear on the face of the complaint, but in reality exist, the objection to those matters if not taken by demurrer or answer is waived.

[635] How such an objection \*could be taken either by demurrer or answer I cannot perceive. The matters in the complaint to which objections can be taken, either by demurrer or answer, must appear on the face of the complaint, or be within the knowledge of defendants. In this case, the want of common interest in the subject matter in dispute on the part of plaintiffs was not discovered until it was disclosed by the evidence adduced at the trial. As those matters did not appear on the face of the complaint, and were not within the knowledge of defendants, it was impossible to take the objection by answer. Whenever the want of common interest on the part of plaintiff, during the progress of the case, is discovered from the evidence, a motion for a nonsuit is proper. (*McDonald & Blackburn v. The Bear River and Auburn W. & M. Co.*, 13 Cal. 238.)

Although, under our statute, joint-tenants and tenants in common can jointly or severally bring or defend any civil action, still when the action is brought jointly they must prove a joint interest in all to enable them to recover; for if all do not recover none can.

CORP, J. delivered the opinion of the Court—FIELD, C. J. concurring.

This is an action to recover possession of a mining claim in the county of Calaveras. The appeal is from a judgment of nonsuit, and the only question is whether the nonsuit was properly granted. It was granted on the ground of a misjoinder of parties, there being as to some of the parties plaintiff no evidence of any interest in the subject matter of the suit.

By the forty-fifth section of the Practice Act objections to the misjoinder or nonjoinder of parties must be taken either by demurrer or by answer, and if not so taken are to be deemed waived. In this case the objection was not taken by demurrer or by the answer, and we are of opinion that the nonsuit ought not to have been granted except as to the parties who failed to establish an interest in the property. It is admitted that as to the plaintiff Rowe the evidence was sufficient, and under the statute no question of a misjoinder could arise at the trial preventing a recovery on his part. His position, according to the complaint, was that of a tenant in common with the other plaintiffs, and as against mere \*trespassers, as the defendants would seem to [636] be, there can be no doubt of his right to recover.

Judgment reversed, and cause remanded for a new trial.

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### PIERCE v. JACKSON.

**REVIEW ON APPEAL.**—On appeal by a plaintiff from an order overruling a motion for new trial, made by him upon the ground of insufficiency of the evidence to justify the verdict, an exception taken by defendant on the trial to the competency of a witness who testified for plaintiff will not be considered. *McCloud v. O'Neal*, 16 Cal. 392, affirmed on this point.

**WAIVER OF GRACE ON NOTE.**—One partner may waive grace upon a firm note made by him, and where such note is made payable on demand without grace an action upon it commenced the next day after its execution is not prematurely brought.

**FIRM LIABLE FOR NOTE MADE BY PARTNER.**—M. and J. were partners, and in the regular course of their business as storage merchants, of which M. had the management, received from plaintiff for storage a lot of grain, M. receipting for it in the firm name. Afterwards, the grain having been lost or converted, M. executed to plaintiff a firm note for its value. In an action upon this note J. defended for himself, averring that the note was in effect the individual note of M., and not binding on the firm, and introduced as evidence certain accounts respecting the

transaction kept by M., purporting to be between plaintiff and M. individually, and also letters from M. to plaintiff, showing that M. had separate dealings with plaintiff, and had designedly kept J. in ignorance respecting the grain transaction: *Held*, that the note, from the circumstances under which it was made, was the note of the firm, on which J. was liable; that the onus was on him to show a discharge from this liability, and that the evidence introduced was insufficient for this purpose.

#### APPEAL from the Seventh Judicial District.

The suit is brought upon a promissory note for \$5,000, signed "Jackson & McComb," payable to the plaintiff on demand, without grace. The note is dated February 12th, 1861, and the complaint was filed the next day, Feb. 13th.

McComb made default. The answer of Jackson does not deny that he and McComb were partners at the date of the note, but alleges in avoidance that the note was given, not for a partnership debt, but for the individual debt of McComb; that McComb was the agent for Pierce, and in that capacity had the control of moneys of the plaintiff which were [637] loaned to sundry persons on pledges \*of grain held as collateral security, and that the plaintiff had afterwards sold the grain and appropriated the proceeds, but still retained the notes, and claimed that they were unpaid, and that the promissory note in contest was made to cover the balance alleged to be due to the plaintiff on these transactions, which it avers were not transactions of the firm, but grew entirely out of the dealings between the plaintiff and his agent, McComb. The answer also sets up the circumstances under which the note was made, alleging that it was done privately between plaintiff and McComb, and that Jackson knew nothing of it until after the attachment in this cause was issued, and as a deduction that the plaintiff and McComb had conspired to cheat and defraud him by the execution of the note.

The replication denies the agency of McComb, and avers that the grain was deposited in the warehouse of Jackson & McComb, and plaintiff held their warehouse receipts for it; that whilst they so held it on storage for the plaintiff they sold a portion of it, and converted the proceeds to their own use without the knowledge or consent of the plaintiff; that they shipped the remainder of it to the plaintiff, at San Francisco,



without his knowledge, and without informing him what grain it was, and directed him to sell it for their account, which he did, and accounted to them for the proceeds, which they converted to their own use; that the note in contest was given to cover the amount thus received by Jackson & McComb from the sales of grain stored in their warehouse in the plaintiff's name, and for his account. .

The replication admits that the execution of the note was intentionally concealed from Jackson, not from any fraudulent purpose, but because the plaintiff, knowing the firm to be in failing circumstances, was apprehensive that Jackson might dispose of his property to defeat an attachment.

On the trial the note was put in evidence, and McComb, under exception of defendant to his competency, was examined as a witness for the plaintiff, and his testimony sustained the allegations of the replication.

Plaintiff also introduced in evidence the warehouse receipts for the grain, executed in the firm name, and showed that the grain \*was received and stored in the regular [638] course of the partnership business.

The defendant introduced witnesses to impeach McComb; and also, to show that the grain was not stored on partnership account, put in evidence the accounts kept with plaintiff, some of which were in the name of McComb alone, and letters addressed by him to plaintiff, showing that some of his (McComb's) transactions were independent of Jackson, and were kept from his knowledge; and also other proof, tending to show collusion between plaintiff and McComb to defraud Jackson.

As to what was done with the grain after it was stored there was no direct evidence, except that of McComb, who testified that it was sold, and the proceeds applied to the use of the partnership.

The jury found a verdict for defendant. Plaintiff moved for a new trial, which was denied, and from this order he appeals.

*Crockett & Crittenden*, for Appellant.

I. Upon the pleadings and the undisputed facts the judgment should be reversed. First—The defendants were part-

ners in the storage and commission business, and had a warehouse for storage, at Suisun City, at the date of the note sued upon, and at the date of the transactions out of which the note grew. Second—The note was executed and delivered during the existence of the partnership. This is admitted in the answer. Third—The plaintiff had loaned money to sundry persons, whose names are stated in the answer, and as a security for his advances a large amount of grain was pledged to him, which he caused to be stored for his account in the defendants' warehouse, and for which he holds the warehouse receipts, which receipts were produced by him on the trial. Fourth—The grain disappeared from the warehouse, and has been sold by some one. The defendant, Jackson, says it was received and sold by the plaintiff, and that he used the proceeds for his own use.

The defendant has entirely failed to show in any method that the plaintiff received to his own use a single dollar of the proceeds of the grain. The burden of proof is on him.

The production of the note made a *prima facie* case [639] for the \*plaintiff. In avoidance, the defendant alleges

that the note was given to cover an assumed liability of the defendants, because of their alleged conversion of the grain and its proceeds to their own use; whereas, the answer avers the grain and its proceeds were in fact converted by the plaintiff to his own use. The replication denies this, and the defendant has utterly failed to prove it. On the contrary, the only proof in the cause on this point clearly establishes that the defendants converted the proceeds to their own use.

The case then is this: Defendants were warehousemen, and received on storage for the plaintiff certain grain, for which they issued to him warehouse receipts, which he still holds; the defendants fraudulently and in violation of their duty sold the grain and used the proceeds; they thereby became liable to the plaintiff for the value of the grain, and as evidence of this liability, and in consideration of it, one of the partners, during the partnership, executed to the plaintiff, in the name of the firm, the promissory note sued upon.

The verdict is, therefore, not simply against the weight of evidence, but is wholly unsupported by any evidence, and should be set aside, and a new trial awarded.

II. A partner clearly has the right to waive grace upon a note made by him in the firm name. There is no force in the objection that the suit was prematurely brought.

III. Whether McComb was a competent witness is immaterial for the purposes of this appeal. (*McCloud v. O'Neal*, 16 Cal. 392.)

*John Currey*, for Respondent.

I. The defendant McComb who had made default, was interested in the event of the action against his co-defendant, and was an incompetent witness for plaintiff. (*Washburn v. Alden*, 5 Cal. 463; *Easterly v. Basignano*, 20 Id. 489; *Lucas v. Payne*, 7 Id. 92, 96; *Gates v. Nash*, 6 Id. 194; Pr. Act, secs. 392, 393; 1 Greenl. Ev. secs. 390, 391; *Jones v. Post*, 4 Cal. 14.)

II. The action on the note in question was prematurely commenced.

\*One partner of a firm, such as that of Jackson & [640] McComb, when dealing with a person knowing the character of the business of such firm, has not the authority, by reason of his partnership relation, to waive the commercial days of grace incident to a promissory note. Before McComb could waive the days of grace which the law of the land gave to Jackson & McComb, as the makers of a promissory note, it must appear that he had express authority from Jackson so to do, or that it had been the practice of such firm thus to do, to a degree from which the necessary authority could justly be inferred. In this case no such authority, express or implied, was proved, and therefore it must be presumed none existed.

III. The verdict and judgment rendered in the case were not only warranted, but were demanded by the evidence.

A Court is not authorized to set aside a verdict of a jury because they find otherwise than the Court would have found. This is the rule laid down by many authorities. (See 3 *Graham & Waterman on New Trials*, 1283, etc.)

The jury had the right and was in duty bound to decide upon the credibility of the witnesses, and having decided against the credibility of McComb, their verdict is conclusive. (3 *Graham & Waterman on New Trials*, 1261-1283; *Carstairs*

v. *Stein*, 4 Maule & Selwyn, 192; *Dickson v. Parker*, 3 How., Miss., 219; *Eaton v. Burton*, 2 Hill, 578; *Winchell v. Latham*, 6 Cow. 682; *Fleming v. Hollenback*, 7 Barb. 275; cases cited in 3 Graham & Waterman on New Trials, 1241-1256; 3 Hill, 251; *Spect v. Hoyt*, 3 Cal. 420; *Bartlett v. Hogden*, Id. 59; *Drake v. Palmer*, 2 Id. 182; *Duell v. B. R. and A. Mining Co.*, 5 Id. 85.

COPE, J. delivered the opinion of the Court—FIELD, C. J. concurring.

We do not see how the verdict in this case can be sustained. The question, as between the plaintiff and Jackson, is whether the latter is responsible for the grain stored in the warehouse of himself and McComb on account of the former. Jackson and McComb were partners, and the grain was stored in the regular course of their business, and receipts were given for it in their name. The charges of fraud and collusion [641] on the part of the plaintiff and \*McComb do not, in our opinion, affect the question of the liability of Jackson. The fact that the grain was stored as stated is clearly proved, and the only way to meet it is to show that the liability incurred has been discharged. The onus rests upon the party asserting it, and the efforts made to discredit the testimony of McComb proves nothing upon the subject. The attempt at the trial was to show that Jackson had no connection with the transaction, but the evidence was obviously insufficient for that purpose. As against the fact that the grain was received and receipted for in the partnership name, the evidence relied on is entitled to no weight. It consists of accounts kept in the name of McComb alone, and letters addressed by him to the plaintiff, in all of which there is nothing repugnant to the position that Jackson was a party. It may be that there were transactions between the plaintiff and McComb to which he was not a party, but there is no evidence that the storage of the grain was other than a partnership matter. As to what was done with the grain, the evidence, so far as there is any evidence on the point, shows that it was sold, and the proceeds applied to the use of the partnership.

The objection that the suit was prematurely brought is

untenable; and the objection to the competency of McComb as a witness is not available on this appeal. (*McCloud v. O'Neal*, 16 Cal. 392.)

Judgment reversed, and cause remanded for a new trial.

On application by respondent for a modification of the judgment—Per COPE, J. FIELD, C. J. concurring.

The petition in this case does not ask a rehearing, but a modification of the judgment, so as to allow the defendant, Jackson, to amend his answer in certain particulars. The Court below, independent of any direction on our part, has full power to allow the amendment, but there is no impropriety in giving the direction, and we shall therefore do so. The costs in the case will abide the event of a new trial.

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**\*CITY OF OAKLAND v. CARPENTIER *et al.* [642]**

**SETTING ASIDE GRANT.**—A complaint in equity, filed for the purpose of setting aside a grant, on the ground that it was obtained by fraud, must state specifically and definitely the facts constituting the fraud.

**VALIDITY OF ACT OF LEGISLATURE.**—The validity of a public act of the Legislature is in no respect impaired by the knowledge or ignorance at the time of the action of the Legislature in passing it on the part of the parties who may be affected by its operation.

**VOID GRANT BY MUNICIPAL CORPORATION.**—A municipal corporation cannot invoke the aid of a Court of Equity to set aside a grant made by its authorities when the grant is void. Such a grant, being a nullity, casts no cloud upon the title of the corporation, and offers no embarrassment to the exercise of its legitimate functions.

**VOIDABLE GRANT.**—Where the Board of Trustees of a municipal corporation makes a grant of its franchises and lands which is not void, but only voidable, the corporation cannot obtain the aid of a Court of Equity to set aside the grant without doing equity—that is, without tendering compensation to the grantee for the expenditures which he may have incurred under the grant, relying upon its validity.

**VOID AND VOIDABLE ORDINANCES.**—The Trustees of the town of Oakland, in 1852, by ordinance, granted to the defendant, H. W. Carpentier, certain franchises and lands, on condition that the grantee should erect certain wharves and other improvements, and pay to the town a certain per centage of the wharfage received. In 1853 the Board of Trustees ratified and confirmed the ordinance. In 1857, and after Carpentier, supposing the grant to be valid, had made expenditures in erecting the wharves and improvements required by the ordinance, the city of Oakland, the corporation which had succeeded to the rights and interests of the town of Oakland, commenced suit for the purpose of having the grant set aside, on the

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<sup>1</sup> *Goodwin v. Goodwin*, 59 Cal. 562.

ground that it was obtained by fraud, and constituted a cloud on the city's title: *Held*, that if the ordinances granting the franchises and lands were void, there was no occasion for the interference of equity; that if they were only voidable, its interference could not be invoked until equity was done by the city, by placing, or offering to place, the grantee, who had relied upon the acts of the agents of the town, in the same position which he would have occupied but for his reliance upon their validity.

### APPEAL from the Third Judicial District.

The facts are stated in the opinion. The case was before this Court at the April Term, 1857, on appeal from an order sustaining a demurrer to the complaint, a report of which will be found in 13 Cal. 540. A trial was subsequently had in the lower Court, resulting in a judgment for the plaintiff, from which the present appeal is taken by defendants.

[643] \**W. H. Patterson*, for Appellants.

I. The lands in controversy are partly swamp and overflowed lands, and partly lands between high tide mark and ship channel of the bay of San Francisco. Hence the title to a part thereof, and dominion over such portion, was in the State of California. (*Pollard's Lessee v. Hagan*, 3 How. 212; *Holliday v. Frisbie*, 15 Cal. 630.)

The State could grant that portion of the lands to which she had title, and the right to erect and maintain wharves, and collect wharfage, to the town of Oakland. (*Gardiner's Institutes*, 273; *Sacramento v. The New World*, 4 Cal. 41, 45; see the statute under which that case was decided, Session Laws of 1852, p. 195, sec. 7.)

The proprietor, (the State,) by law of May 4th, 1852, granted said lands in fee to the town of Oakland. Section one incorporates a certain territory as the town of Oakland, ship channel being one of the boundaries of the territory; section two vests corporate powers in a Board of five Trustees; section three is as follows:

"The Board of Trustees shall have power to lay out, make, open, widen, regulate, and keep in repair, all streets, etc., wharves, docks, piers, slips, etc., and to authorize the construction of the same, and with a view to facilitate the construction of wharves and other improvements the lands lying within the limits aforesaid, between high tide and ship chan-

nel, are hereby granted and released to said town; *provided*, that said lands shall be retained by said town as common property, or disposed of for the purposes aforesaid, to regulate and collect wharfage and dockage."

This was a grant of a present, immediate, and vested interest, from the proprietor to a party capable of receiving it. (For similar grants, see *Lester's Land Laws*, p. 61, sec. 8; *Laws of California of 1851*, p. 309, sec. 2; *Doll v. Meador*, 16 Cal. 295, and cases cited by the Court; *Holliday v. Frisbie*, 15 Id. 630.)

By that statute there is: first, a grant to the town of Oakland and its grantees of a portion of the lands in controversy; second, the right to erect and maintain wharves and collect wharfage; third, express authority to the town to dispose of the thing granted for the purpose of facilitating the construction of wharves, and \*other improvements. Such [644] disposition might be: first, by absolute sale of the whole or a part; second, by lease for a term of years at a fixed rent; third, by grant, absolute, as was done by the ordinance. (*Argenti v. City of San Francisco*, 16 Cal. 255; *Angell & Ames on Corporations*, 153, 159, 3d ed.)

We quote: "Corporations aggregate have at common law an incidental right to alien or dispose of their lands and chattels, unless specially restrained by their charters or positive statute. Independent of positive law, all corporations have the *jus-disponendi*, neither limited as to object, nor circumscribed as to quantity." (2 *Kent's Com.* 227; *The Mayor, etc., v. Lawton*, 1 Ves. & Beames, 226; *Binney's Case*, 2 Bland's Ch. 142.)

"A corporation authorized to dispose of its property may, in general, dispose of any interest in the same it may deem expedient, having the same power in this respect as an individual." (*Reynolds v. Com. of Stark Co.*, 5 Ham., Ohio, 205.) Thus it may lease, grant in fee, or tail, or for term, or life. (*Jackson v. Brown*, 5 Wend. 590; 8 Watts, Pa., 385; *Coke Lyttleton*, 44 a, 300, 401, 325 b, 341 b, 342; 1 *Kid on Cor.* 108, 116.)

Not having established a different rule by statute in this State, the authorities above referred to govern in this case. But in the present case we are not driven to rely upon the com-

mon law authorities, because the power of disposing of all that was granted to the corporation of Oakland is expressly given, and the term is not specified or restricted.

The disposition of the property, etc., made by the ordinance was a strict compliance with the object for which the State made the grant to Oakland.

II. The ordinances of the town of Oakland granting to defendant, H. W. Carpentier, the lands, etc., were ratified and confirmed by the act of the Legislature of May 15th, 1861, amending the charter of the city of Oakland.

That the act is sufficient on its face to ratify and confirm said ordinances, and that the municipal corporation of Oakland was under the control of the Legislature, which body had power and authority to confirm, ratify, and validate such ordinances, is settled by the following authorities: [645] *Moore v. Patch*, 12 Cal. 265; \**Cowell v. Daub*, Id. 273; *Sedg. on Stat.* 199; *Hart v. Burnett*, 15 Cal. 612. And such ratification and confirmation took effect without any action on the part of the corporation of Oakland.

The attempt to show that this act was passed by fraud utterly fails. When and how were the one hundred and sixteen legislators corrupted, defrauded, or deceived into voting for the act? How and by whom was the Governor induced to approve of it? The proposition that an enactment of the law-makers can be disregarded and set aside upon evidence that Carpentier concealed from one of the legislators, who introduced it, the object intended by its passage, is too absurd to be worthy of the consideration of a Court.

If a law of our State is to be set aside and disregarded on such pretexts, upon no proof, but upon a suspicion of fraud, we shall expect to see the entire enactments of the Legislature set aside by a bill in equity. Conceding, for the sake of the argument, that this confirmatory statute might be set aside for fraud, it must be fraud in fact. It must be clearly and unmistakably shown that enough of the legislators who voted for it to secure its passage so voted because they were deceived or corrupted, neither of which can be assumed, and neither was attempted to be proven. If, as we insist, this statute is a law, and to be upheld, there is an end to plaintiff's case, as



it ratifies and makes valid, not only the ordinance of May 17th, 1852, but also the ordinance of August 27th, 1853.

Another proposition to be considered is whether a void act can be ratified—not because the question properly arises in the case, but because it is claimed to by the plaintiff. It is contended that the doctrine which denies the confirmation of a void act, as between private parties, can be successfully invoked in the case of a ratification by the sovereign. We have been unable to find a single authority to sustain this position; but, on the other hand, many which draw the distinction between the two cases, and with unanswerable reasoning affirm the validity of the ratification by the sovereign of a void act. (*Wilkinson v. Leland*, 2 Pet. 627; *Watson v. Mercer*, 8 Id. 88; *Hess v. Wertz*, 4 Sergt. & R. 356; *Comyn's Dig.* confirmation D; 1 Rol. 483, b. 5; *Payne v. Treadwell*, 16 Cal. 233.)

\*III. Plaintiff does not offer to do equity, and [646] cannot therefore have any standing in a Court of Equity. The following facts are established by admissions in the pleadings, and by the findings of the Court:

1st. That in 1852 the town of Oakland had no wharves, no funds, and no ability to erect such wharves or a school-house. 2d. That at the time of the passage of the ordinance of May, 1852, the whole of the land granted by the Legislature was not worth to exceed \$5,000. 3d. That H. W. Carpentier complied strictly with the terms and conditions of said ordinance. 4th. That Carpentier in pursuance thereof, in 1852, erected a school-house at an expenditure of \$1,600, and in the same year erected wharves at a cost of \$40,000; that such school-house was accepted and used by plaintiff up to the filing of the complaint (and, as appears by the testimony, up to the time of the trial.) 5th. That no part of such expenditures has been returned to the defendants, either from receipts from the wharves or by voluntary payment by plaintiff. 6th. That the erection of such wharves materially contributed to the growth and prosperity of Oakland. 7th. That defendants have kept said wharves in repair and subject to the use of the public. 8th. That unreasonable tolls, wharfage, or dockage, have not been charged at such wharves. 9th. That the plaintiff has derived revenue therefrom, by the

imposition and collection of taxes, and by the receipt of two per cent. of the gross amount of wharfage, etc.

If there was any fraud or misconduct, the corporation of the town of Oakland, and its successor, the city of Oakland, participated in the fraudulent act, and derived benefit therefrom.

The interposition of Courts of Equity is governed by an "anxious attention to the claims of equal justice, and therefore it may be laid down as an universal rule, that they will not interfere unless the plaintiff consents to do that which the justice of the case requires to be done." - (Fonblanque's Eq. 219; Francis' Maxims.)

It is not necessary to argue that the corporation ought not to retain the school-house and the wharves erected with defendant's money without returning the principal and interest.

[647] \*The maxim, "He who seeks equity must do equity," lies at the foundation of equity jurisprudence. (3 Sand. S. C. 671; 1 Sto. Eq. Jur. sec. 64, p. 76, and cases, note 5.) And for not making the offer of payment, plaintiff's bill should be dismissed, and final judgment rendered for the defendant. (1 Sto. Eq. Jur. sec. 301; 4 Brown's Ch. 436; 1 Johns. Ch. 367; 5 Id. 142.)

IV. The several charges of fraud, as averred or attempted to be averred in the complaint, are not sustained. The first charge is that by fraud and collusion Carpentier procured the passage of the act of incorporation without the consent of the people of the town, etc. We answer: 1st. The fraud charged was not upon the town of Oakland, or the inhabitants thereof, as neither had any estate in the water front, nor any privileges of which to be defrauded. The fraud, if any, was upon the State, because a grant of the lands, wharf privileges, and corporate powers, was obtained from the State, and not from the inhabitants of Oakland, and the State is not a party complaining. 2d. If the Act of 1852 was void for fraud, then plaintiff had no standing in Court, and no title to be affected by this action, or by the acts complained of. 3d. The charge is unsupported by any evidence.

The next charge is that Carpentier fraudulently procured the election of a majority of the Trustees under the charter

of 1852, and that two of the Trustees were partners of defendant. The charge that he procured their election is wholly unsupported by the evidence. It is not shown that he even resorted to any of the usual modes of carrying an election. He is not shown to have even voted himself; and the most he is shown to have done was to have had one or two tickets in his possession. It is not claimed that the other two Trustees were corrupted, or under the influence of the defendant, and they composed one-half of the Board who were elected and qualified. But it is said that the first two were partners of the defendant, not in procuring the ordinances complained of, but in the sale of lands. There is no evidence of it. The whole charge is unsupported.

The next charge is that Carpentier procured fraudulently the passage of the ordinance of May 17th-18th, 1852. The ordinance passed by unanimous vote—ayes and noes being called. It was \*not adopted hastily—it was re- [648] considered and amended. No promise or inducement was held out to the Board of Trustees, or any member thereof, to secure its passage. Within the corporate limits were about thirty or forty inhabitants, all told, two houses, and a half dozen shanties. It possessed no school-house, no wharves, and no money in the treasury with which to erect either. Its entire corporate property did not exceed \$5,000. The power to impose taxes was at that time but a shadow. Tested by the state of affairs then existing, any honest man would say the corporation made a good bargain, and Carpentier a bad one, by the grant contained in the ordinance and the performance of its conditions.

We insist that the plaintiff's side of this case is so devoid of equity that the material averments of the case, and the findings of the Court below, are so wholly unsupported by the evidence, and the equities of the defendants so strong, that this Court should place upon the record a complete refutation of all the charges of legal or moral fraud and wrong, and should go further and direct judgment final for defendant, as was done in *McMillan v. Richards*, 12 Cal. 421; *Holliday v. City of San Francisco*, 7 Id. 362; *Bagley v. Eaton*, 10 Id. 126, 149; 18 Id. 339, 670; 2 Id. 81; 1 Id. 370.

*Eugene Casserly*, for Respondent.

I. By the Act of May 4th, 1852, which is the common source of title to both parties, the water front of Oakland was granted by the State to the town; not, however, in the absolute sense contended for by appellants, but by a special and qualified title, upon condition, subject and limited to certain specific uses and purposes of municipal government, and as inseparably connected with and accessory to those uses and purposes.

The purposes for which the State made the grant were, to enable the town to make, regulate, and keep in repair all wharves, docks, piers, etc.; to secure the construction of these essential improvements, and to enjoy in the utmost benefit the governmental powers and franchises bestowed upon it over the whole subject. "For these purposes," and to enable the town to carry them out, it was left in its power, from time to time, to lease or even sell such [649] \*portions of the water front as might be so "disposed of" advantageously, and without materially interfering with or impairing the governmental powers and franchises granted. No power was given to the town under any pretext or for any "purpose" to convey the whole of these lands in a body to the appellant, H. W. Carpentier, or to any other person.

The grant by the State to San Francisco of the water front in the "water lot bill" was of a totally different character. It was without limitation, except as to the term of years; and in all other respects was absolute and unqualified, vesting the property in private ownership, subject to all the usual incidents thereof. In *Holliday v. Frisbie*, 15 Cal. 630, this circumstance was insisted on by this Court as distinguishing the title of San Francisco under the water lot bill from her title to her uplands; and as the reason why her property in the water lots was liable to levy and forced sale, while her upland property was not.

The doctrine for which I contend is fully and conclusively established by this Court in *Hart v. Burnett*, 15 Cal. 530; a great case, of which, since the Judge who delivered the decision in it is no longer in this Court, I may be suffered to

say that it will ever remain a monument of learning, ability, and comprehension of the whole subject of title to municipal property. Though the precise question there decided was as to the liability of the uplands of San Francisco to levy and sale under execution, yet the decision was itself the conclusion from premises identical with the doctrine claimed by us here, which is as true under our system of laws as it was under the Mexican, namely, that lands of a municipal body, which, by the terms of the grant from the sovereign power, are devoted to specific public purposes, charged with certain conditions and made subject to expressed public uses, cannot be divested or disposed of to an individual so as to defeat or impair those purposes, conditions, and uses, with or without the consent of the officers of the municipality.

II. The ordinances and proceedings of the Trustees of Oakland, relied on by the appellants, either by way of original "grant" or subsequent "ratification," are not an exercise of the powers \*granted by the statute, but are in [650] gross excess and violation of them, and are therefore null and void.

The first and main ordinance has two principal sections: one giving, or purporting to give, to "H. W. Carpentier and his legal representatives for thirty-seven years the exclusive right and privilege of constructing wharves, piers, and docks," within the town, with the right of collecting wharfage and dockage during all that period, "at such rates as he may deem reasonable;" and the other, granting, or purporting to grant, to Mr. Carpentier, and "to his assigns or legal representatives," the entire water front of the town between high tide and ship channel, "with all the improvements, rights, and interests" thereunto belonging, in fee simple forever.

The first section is null and void, because it conveys, or attempts to convey, to H. W. Carpentier, and not only to him, but to all and singular "his legal representatives," for the period of thirty-seven years, (in this State equal to a century of time elsewhere,) first, the exclusive right and privilege of constructing wharves, piers, docks, and slips anywhere within the town of Oakland; and second, of charging wharfage and dockage "at such rates as he may deem reasonable." This is in terms a grant to an individual of the entire body

of municipal rights and powers in and over wharves, docks, etc., granted to the town by the act of incorporation.

Municipal corporations have no capacity to delegate in gross, or even materially to abridge or impair, the whole or any branch of the legislative power confided to them by law; and any attempt so to do, whether directly by a grant of the power, or indirectly, as by the medium of a contract, is simply void. (*Gosler v. Georgetown*, 6 Wheat. 597; *East Hartford v. Hartford Bridge Co.*, 10 How. 535, and cases cited; *Thompson v. Schermerhorn*, 2 Seld. 92; *Brick Church v. City of New York*, 5 Cow. 538; *Coates v. Mayor, etc., of New York*, 7 Id. \*585; *State, etc., v. Mayor, etc., of New York*, 3 Duer, 130.)

The second section of the ordinance is in all respects a manifest violation of the statute. Upon its face it shows that the grant of the water front to Mr. Carpentier was made in consideration of his agreement with the town to build for it "a public school-house." For this "purpose" expressly, the entire property was "disposed \*of" to him. Nothing is clearer than that this was not one of the "purposes aforesaid," specified in the statute.

It is a settled principle of law that where land or other property is held by a municipal corporation, as subject to and united with certain public uses and purposes, the property cannot be separated from the uses, and hence cannot be divested with or without the consent of the corporation. The public use being the principal thing, and the property being the incident indissolubly connected with it, and the former being inalienable, the latter follows it. (*Hart v. Burnett*, 15 Cal. 590, recognizing the principle of *Ammant v. New Alexandria & P. T. Co.*, 13 S. & R. 210, and *Susquehanna Co. v. Bonham*, 9 Watts & Serg. 28, as clearly applicable to municipal corporations.)

The original ordinance being null and void to all intents and purposes, for illegal excess of power, it is unnecessary to consider the effect of the several subsequent ordinances, resolutions, acts, and proceedings of the town officers, in that and other years approving and accepting the wharves and school-house built by Mr. Carpentier, declining his offer to surrender the wharves and so on—by which it was sought to "ratify and confirm" it, successfully as counsel contend. For

that or any other such purpose they had no effect whatever. What the Board of Trustees had no power, in any way, to do originally, they could not subsequently ratify or confirm. The capacity to ratify involves, of necessity, the capacity to do originally the act ratified. This is perfectly settled in this Court. (*McCracken v. San Francisco*, 16 Cal. 623; *Zottman v. San Francisco*, 19 Id. 102.) In these cases the original defect was in omitting to pursue the statutory mode of exercising the power; and not as here, a total want of power, without reference to the form of the attempted use; which is, of course, a stronger case. The wonder is that it should ever have been doubted, being manifest good law and common sense.

III. The Act of May 15th, 1861, amending the charter of the City of Oakland, which is relied on by the appellants, as ratifying and confirming the ordinances in question, cannot be so construed as to have that operation. Such a construction nullifies and rejects several express special provisions for the sake of one general clause. \*A clause [652] or section of an act being, in its literal sense, inconsistent with the general scope and meaning of the act, is so construed as to make it harmonize therewith. (*Brown v. Wright*, 1 Green, N. J. 442; *Holbrook v. Holbrook*, 1 Pick. 250.) And a general subsequent clause will be construed by means of preceding clauses, and so as not to conflict with them. (*State v. Garthwaite*, 3 Zab. 144; and see *McCarte v. Orphan Asylum*, 9 Cow. 507; *Commonwealth v. English*, 1 Bibb, 81; *United States v. Freeman*, 3 How. 566; *Williams v. Pritchard*, 4 T. R. 2.) In *Flynn v. Abbott*, 16 Cal. 365, a repealing clause, general and absolute in its terms, was held to be limited by preceding special provisions of the act. In all cases, the intention of the Legislature must control, to be gathered from the language and subject of the whole act, even though contrary to the letter of a particular clause or sentence. (1 Kent's Com. \*461, and cases cited; *Tbunle v. Hall*, 4 Comst. 144; *People v. Utica Insurance Co.*, 15 Johns. 380, per Thompson, C. J.; *Jackson v. Collins*, 3 Cow. 95.)

The Legislature did not intend and could not have intended, by the clause of section twelve in the amendatory Act of 1861, to confirm the ordinance of 1852 of the trustees

of Oakland, under which Mr. Carpentier seeks to make out his title. It certainly had no such intention with respect to so much of the ordinance as aims to transfer to him the legislative power of the town over the subject of wharves and wharfage for thirty-seven years. If not as to that there is no reason for supposing it had such intention with respect to so much of it as sought to grant away to him the entire water front. That property had originally been granted to the town by the Legislature in furtherance of the municipal legislative power over wharves and wharfage, and as accessory thereto. No intention in the Legislature being shown to take away or in any respect to impair the power, which was the principal thing, but on the contrary, a very marked purpose to confirm and maintain it in full force by successive statutes, there is no ground to infer an intention to divest the thing given as an accessory thereto and in furtherance of it. The same motives of public policy which induced the Legislature originally to unite in the same municipal body the [653] \*governmental power over wharves and wharfage with the proprietary control of the water front, existed in full force in 1861, to repel the presumption of any intention then to separate them. Especially when you have to base this presumption on a few general words of a general section of an amendatory act, the main scope and object of which are to regulate and confirm a system of municipal powers as an integral and important part of which the power in question is expressly reenacted, granted, and confirmed to the city.

The circumstances under which Mr. Carpentier procured the passage of the amendatory Act of 1861 are also proper for consideration. It is sometimes supposed, because the distinction in the English Courts between public and private acts of Parliament for the purposes of pleading, does not exist to the same extent, if at all, in the United States, that therefore the distinction between them for every purpose is obliterated with us. This seems to me to be a grave error, not sustained either by principle or authority. On principle there is, and always must be, for all purposes of construction, validity, and general effect before the Courts, as between parties litigant, a very substantial difference between a legis-



lative act affecting the whole or any class of the people, and one which concerns solely a private individual. The same motives of public policy and the higher reason of constitutional regulation and division of powers of government which forbade the attempt to set aside in judicial proceedings a legislative enactment of the former class, do not apply with the same, or indeed any force, to those of the latter class. Especially where the private act is in the nature of a conveyance, affecting, directly or indirectly, the rights of third parties, there seems no reason why the latter should be debarred from showing in any suit or proceeding where the act is relied on by the party who procured its passage that he did so, directly or indirectly, by improper practices, for which the like conveyance between private parties would be set aside by the Courts, or at least, the guilty party would be forbidden to claim any benefit therefrom. A private act of the Legislature has often been likened in the Courts to a conveyance; and in the sense in which I am now discussing that class of acts, there seems no good reason why \*they should not be dealt with in the Courts as [654] against third parties upon the same grounds. The distinction between public and private acts is sufficiently recognized by authority. (*Dwarris' Statutes*, \*629, 690; *Catlin v. Jackson*, 8 Johns. \*555; *Jackson v. Catlin*, 2 Id. \*263.)

It is no answer to say that the act here in question (the amendatory Act of 1861) is a public, not a private act. As I construe it, it is a public act throughout. Under the construction which appellants' counsel seek to fasten upon the clause of confirmation inserted into section twelve, that clause, as between Mr. Carpentier and the City of Oakland, is a private provision for his exclusive benefit, granting to him individually all that the ordinance of 1852 attempted to grant, and in respect of that clause the act is a private act. It is settled the same act may be both public and private, and there is no reason this should not be so. (*Dwarris' Statutes*, \*630, and cases cited in note *m*. *Jackson v. Catlin*, 2 Johns. \*263.)

Again, any ambiguity of legislative expression should be resolved in favor of public not of private interests. This rule must apply with the utmost force in the present case,

where, as the findings show, a deception was practiced by Mr. Carpentier in respect of the clause in question, upon the member of the Legislature who introduced the act, and through him on the Legislature at large; and where, whatever be the legal effect of that fact, the ambiguity of the language of the clause is directly chargeable to Mr. Carpentier, who prepared the draft of the bill and had it introduced into the Legislature. Particularly where the effect of the construction now contended for by him is greatly to benefit his private interests at the expense of the city and people of Oakland and the public at large.

IV. The objection of the appellants to the complaint, that while it asks equity it does not offer to do equity, is not valid upon this appeal.

1. The principle invoked by the appellants, that the City of Oakland being before the Court asking equity, should have offered to do equity by tendering back to Mr. Carpentier his expenditures for wharves, school-houses, etc., is not, I submit, at all applicable to a case like the present. It is [655] a rule only in cases where a plain-\*tiff is in Court seeking to set aside some act or contract voidable, but not void, as for fraud, mistake, etc.; or to rid himself of a liability otherwise valid, upon a ground which is against good conscience, and not favorably regarded in equity, as usury, gaming, etc. Here our case is, that there never was a grant, contract, or act of any sort on the part of the town; whatever might have been attempted by her unfaithful agents. As already remarked, she was an artificial being, endowed by the law of her creation and existence with certain limited powers and functions, and utterly incapable of acting, or even of being, beyond or against these, to any intent or purpose whatever. She has come into equity to have the Court declare the law upon this point for her protection against the claims of Mr. Carpentier, and to decree that these pretended grants, contracts, and proceedings were no acts of hers. Is it possible she must be denied this clear justice because she has not tendered to Mr. Carpentier the large sums of money which, as he says, he has expended in "improvements" upon her property, under a claim of title thus set up by him? As well might it be said, if I give my agent a power of attorney

to sell one of my lots in San Francisco but not any of the rest, and he attempts to convey all the rest to a third party well aware of this prohibition—which is, of course, to both of them the law of the transaction—that I shall not be heard in equity to ask for a decree setting aside the transaction and declaring the attempted conveyances null and void, without having first tendered to the unconscionable purchaser his large expenditure for improvements. There is no such law and never was.

*D. P. & A. Barstow and H. P. Irving*, also for Respondent.

I. The land in controversy was granted by the State to Oakland, not in fee, as so much property to enrich the town, but to enable the town to enjoy valuable franchises granted at the same time, and to execute important trusts, imposed for the benefit not only of the citizens of the town, but of the whole State as well. (*Hart v. Burnett*, 15 Cal. 590, *et seq.* Previous decision in 13 Id. 540; *Minturn v. Larue*, 1 McAllister, 370; 23 How. 435.)

II. The appellants contend that the bill should be dismissed \*and judgment entered in their favor, [656] because the respondent did not tender back the school-house and offer to pay for the wharves erected by them.

A sufficient answer is the fact, that this Court has already pronounced the complaint sufficient. It was demurred to on the ground, “that it did not state sufficient facts to show a cause of action.” (13 Cal. 540.) This Court held that it did state sufficient facts. Had there been any conditions precedent upon which the right of action depended, the complaint would have been fatally defective in failing to show that those conditions had been satisfied. That there may be circumstances when a party who comes into a Court of Equity, asking to be relieved from a contract, may be required to tender money which he himself has received upon that contract, we admit. But every case of this character that can be found in the books will be found to be a case where the plaintiff, who has received the money or property, asks the relief of a Court of Equity. The Court, in cases of this kind, may require of the party to do equity before he receives equity. This is not a case of that kind, but a case of a third

party, a *cestui que trust*, asking relief against the fraudulent and illegal act of its trustees. The trustees who made this contract had no individual or personal rights in the franchise or property pretended to be ceded to Carpentier. It is the City of Oakland in its corporate capacity whose rights have been violated, and not those of the individuals composing the Board. If a trustee exceeds his power, and pretends to convey property or rights which he has no power to convey, surely the *cestui que trust* has a right to come into a Court of Equity to set aside the conveyance, and is not bound to tender to the party contracting with his trustee the amount of any expenditures made on the property fraudulently or illegally conveyed. The appellant contracted with the trustees with full knowledge of their want of power to convey the property and franchises. Their power was defined by a public act. It is, therefore, absurd to contend that the City of Oakland should indemnify him from the consequences of his own illegal acts. He stands like any other individual who purchases property, or makes a contract with an agent who exceeds his powers.

[657] \*III. The appellants contend that by the act of the Legislature, passed May 15th, 1861, the ordinances before mentioned were ratified and confirmed, from which a good and valid title to the property and rights in dispute accrued to them.

To this we answer—1st, that the Legislature in passing the said act did not ratify or confirm those ordinances of the Board of Trustees which were procured by fraud; 2d, that the Legislature had not the power to ratify or confirm said ordinances, so as to give them an operation to affect injuriously the vested interests of the City of Oakland in her property rights and franchises; 3d, that as to the property rights of the city the act in question is a private statute, the passage of which was obtained by fraudulent suggestions, and that a Court of Equity ought and will relieve against it where it interferes with vested rights.

1st. In construing a statute, where the language is doubtful, the only fact to be ascertained is the intention of the Legislature in passing it.

In *Smith v. Randall*, 6 Cal. 50, the Court says: "The in-

tention of the Legislature, where it can be ascertained, must govern in the construction of a statute. This intention should not be taken from a particular section, but from the whole statute." So in *People v. Roberts*, 6 Cal. 216, and in *Ex parte Ellis*, 11 Id. 223.

In construing statutes, force and effect should be given to every part of them. (*People v. Utica Ins. Co.*, 15 Johns. 358.) And for the purpose of arriving at the legislative intent, all acts on the same subject matter are to be taken together and examined in order to arrive at the true result. All acts *in pari materia* are to be taken together as if they were one law. (Sedgwick, 247.)

Another rule is, that remedial statutes are to be construed largely and beneficially so as to advance the remedy. (Sedgwick, 359.) Again: that in construing a doubtful statute, the Court will consider the consequences resulting from a particular construction. Apply now the foregoing rules of construction to the Act of May 15th, 1861.

The clause of the act which the appellants rely on as ratifying and making valid the ordinance in question, is contained in the \*third section, and is in these words: [658] "And the ordinances of the Board of Trustees of said town are hereby ratified and confirmed." There is no necessary connection between this clause and the other portions of the section. It stands alone, and we must resort to means outside of the context to ascertain its meaning.

On the fourth of May, 1852, the Legislature passed an act entitled "An Act to Incorporate the Town of Oakland, and to provide for the construction of Wharves thereat." The third section of that act gives the Board of Trustees of the town power, among other things, "to lay out, make, open, widen, regulate, and keep in repair all streets, roads, bridges, ferries, public places, and grounds, wharves, docks, piers, slips, etc.; to regulate and collect wharfage and dockage, etc."

The Act of March 25th, 1854, entitled "An Act to Incorporate the City of Oakland," provides that the Common Council of the city shall have power, among other things, "to construct and keep in repair bridges, fences, public places, ferries, wharves, docks, piers, slips, etc., and to regulate and

collect tolls, wharfage, dockage, and cranage upon all water crafts, and all goods landed," etc.

The Act of May 15th, 1861, provides that the Common Council shall have power "to construct and keep in repair bridges, fences, public places, ferries, wharves, docks, piers, slips, etc., and to regulate and collect tolls, wharfage, dockage, and cranage upon all water crafts, and all goods landed," etc.

The Act of April 24th, 1862, which repeals all the preceding acts, provides that the Common Council shall have power to "construct and keep in repair bridges, fences, public places, wharves, docks, ferries, piers, slips, etc., and to regulate and collect tolls, wharfage, dockage, and cranage upon all water crafts, and all goods landed," etc.

This power, given to the city at the time of its incorporation, has been regranted, in all subsequent acts, with such exactness that even an orthographical error which occurs in the first act has been repeated in all the others.

It appears by these acts that the Legislature considered the wharf privileges of very great importance to Oakland, almost surrounded as she is by the waters of the bay [659] and creek, and from \*first to last has renewed and confirmed the grant whenever laws have been passed rendering it proper to do so.

It is apparent from these facts that the Legislature never supposed that Oakland had conveyed to Carpentier all right to and control over those franchises, or the Act of April 24th, 1862, would not have contained the clause regranteeing the same to her. If the ratifying and confirming clause in section third of the Act of May 15th, 1861, had been designed to operate in the manner claimed by the appellants, the Legislature would not have passed an act the following year taking from Carpentier rights vested in him by virtue thereof, and giving them to the City of Oakland. Nor would the first section of that act regrant to the city all those wharf privileges if the Legislature intended to take them away by the third section of the same act. Nor would the Legislature, in the last clause of said third section, have given the Common Council power to "maintain suits in the proper Courts, to recover any right or interest or property which may have accrued to the town of Oakland," if it had intended to turn the

plaintiff out of Court by the preceding clause of the same section. Besides, the third section is repugnant to the grant contained in the first, if their construction be the true one.

"Where a particular thing is given or limited in the preceding part of a statute, this shall not be taken away or altered by any subsequent general words of the same statute." (Smith, sec. 653.)

The Legislature cannot be presumed to do so absurd a thing as to make a solemn grant to a municipal corporation of powers vital to its well-being in one section of an act, and revoke the same in another section of the same act.

The Act of May 15th, 1861, was passed to confer on the City of Oakland enlarged powers for its government and welfare. The Act of 1854, to which it is amendatory and supplementary, was in some respects defective in its grant of powers, and those defects were intended to be obviated by the new act, whose design was to grant further privileges to the corporation, to increase its capacity for self-government, and to promote its general interests.

2d. The Legislature had not the power to ratify or confirm said ordinances so as to give them an operation to affect injuriously the \*vested interests of the City of [660] Oakland in her property rights and franchises. (3 Kent's Com. 565; *Dartmouth College v. Woodward*, 4 Whea. 518; *Benson v. The Mayor, etc., of New York*, 10 Barb. 242; *Grogan v. San Francisco*, 18 Cal.; *Dash v. Van Kleeck*, 7 Johns. 502; *Lewis v. Brackenridge*, 1 Blackf. 220; *The Society, etc. v. Wheeler et al.*, 2 Gallison, 139.)

3d. The Act of 1861, as to that portion which relates to the ratification of said ordinances, so far as it is intended to affect injuriously the vested rights of Oakland in her property or franchises, is a private statute, (*Smith v. Morse*, 2 Cal. 546; Sedg. 32, note 1; Kent's Com. 506; 1 Blackf. 86, note 21,) the passage of which was obtained by Carpentier by fraudulent suggestions, without the knowledge or consent of Oakland, and ought to be relieved against by a Court of Equity. (*Catlin v. Jackson*, 8 Johns. 554.)

*Heydenfeldt*, for Appellants, in reply.

I. In regard to the power of the City of Oakland to make

the grant in question, the respondent's argument makes no distinction between the grant of the lands and the grant of the franchise. These are essentially different, and must be so treated. In the act granting the lands to the city, the power of disposing of them is given in its largest terms. But it is assumed that all the lands could not be granted without defeating the power to erect wharves, for it is asked what right would the town have to build wharves on the land of another?

We have several answers: 1st. All the land did not pass by the grant, because that portion which would be the protractions of the streets were, by the plan of the city, dedicated to public use, as was decided by this Court in *Wood v. San Francisco*, 4 Cal.

2d. The city might reacquire by purchase, if necessary, any portion of the water front, and thus exercise her power of erecting wharves.

3d. At the termination of the lease to Carpentier she would again resume full control of the whole subject matter.

4th. It would be absurd to imagine that all the land was necessary for the purpose of wharves: the respondent says there are nine thousand acres. Now, not only the [661] quantity but the power \*given to dispose of them would contradict the assumption of any such necessity.

That the grant and the power to dispose of these lands constitutes them absolute property in the town, free from any trust, was fully settled by this Court in the case of *Holliday v. Frisbie*, 15 Cal. 630.

The City of Oakland had the title to the wharf franchise, but it is said there was a public trust connected with the title, and therefore she could not lease the franchise. Why not? In all parts of the world these franchises are in the hands of private individuals and dealt with for the purpose of trade and profit. If the city retained the immediate control, she would have to deal with them by the hands of individual agents, then why not by the hands of an accountable lessee? The term of lease is not a long or unreasonable one in the lifetime of a municipal corporation, and particularly of a town whose existence had just commenced, which then used



the only possible means in its power to carry into effect and exercise the trust confided to her. But if there be any doubt as to the power of the corporation to lease the franchise, then that doubt is dispelled by the confirmatory Act of 1861.

II. Against our proposition, that there was no offer on the part of plaintiff to do equity by tendering back the expenditures of the defendant, the respondent rests upon the previous opinion of this Court overruling the demurrer.

To this we answer—1st, that the question was not argued on the demurrer, or brought to the notice of the Court; 2d, that after demurrer, and at all times and in any Court, it is perfectly allowable to move to dismiss the bill for want of equity.

III. It is insisted by respondent that the Act of the Legislature of May 15th, 1861, did not confirm the ordinances in question. Their citation of authorities as to the construction of statutes is vain and inapposite. They seem to have forgotten the rule, which holds that what is plain and unambiguous is not the subject of construction. The act says "the ordinances are confirmed." Can the Court say that some ordinance is not confirmed? Has the Court power to go behind and against the words used by the Legislature, so as to determine that the Legislature did not intend what it said it intended?

\*It is also urged that the Legislature had not the [662] power to confirm. Under this Act of 1861 we claim only the ratification of the lease of the wharves. This has already in this case been decided to be a public trust, or in the language of the Court in *Hart v. Burnett*, a public trust connected with the title—the title being in the city. The only difference is, that in the one case the property was land, in this a franchise; both are alike property, subject to ownership. Then the power of the Legislature over all municipal property wherewith a public trust is connected has been settled by this Court. (*Payne & Dewey v. Treadwell*, 16 Cal. 225; *San Francisco v. Beideman*, 17 Id. 443; *Hart v. Burnett*, 15 Id. 616.)

IV. It is said that the Act of 1861, so far as it ratifies the ordinances in favor of Carpentier, must be treated as a private act, and can therefore be relieved against in a Court of Equity,

and various authorities are cited to sustain this proposition. If the Court will examine the authorities, it will find that all the cases rest upon the fact that the interests of third persons are affected, and that consequently the Court gives relief. In England the Courts of Equity, as they term it, relieve against it, at least there have been two or three cases of the kind. In the United States the same decision would be made, on the ground that the Legislature had no power to take away the property of one private individual and give it to another; the law would be deemed invalid because unconstitutional. But here we are dealing with a municipal government, which is created and can be destroyed by the legislative breath; which can be reformed, remodeled, reorganized, limited, and constrained, or enlarged and liberated; its powers taken away, or compelled to the exercise of much vaster powers than it has—all at the beck and nod of the legislative will.

Here, then, on this subject of public trust, this wharf franchise of the municipal corporation, the Legislature has exercised its will and power, and no one can gainsay it.

FIELD, C. J. delivered the opinion of the Court—COPE, J. and NORTON, J. concurring.

By an act of the Legislature, passed May 4th, 1852, [663] the town \*of Oakland was created a municipal corporation, the corporate powers being vested in a Board of Trustees, consisting of five members, to be elected on the second Monday of May of each year. By the third section of the act the Trustees were clothed with certain powers in relation to wharves, piers, and docks; and with a view to facilitate the construction of wharves and other improvements, the town was invested with the title to lands within the corporate limits lying between high tide and the ship channel of the bay of San Francisco. On the second Monday of the same month, pursuant to the act of incorporation, an election was held, and five Trustees were chosen. Of these only four ever qualified; and at a meeting of the Trustees, consisting of this number, an ordinance was passed granting, in its first section, to the defendant, Horace W. Carpentier, and his legal representatives, for the period of thirty-seven years, the exclusive right and privilege of con-

structing wharves, piers, and docks, at any points within the corporate limits of the town, with the right of collecting wharfage and dockage at such rates as he might deem reasonable, subject to certain provisions as to the erection of particular wharves, and the payment to the town of a certain percentage of the receipts of the wharfage; and granting to him, in its second section, with a view, as expressed therein, the more speedily to carry out the intentions and purposes of the act of incorporation, and in consideration of a contract on his part to build a public school-house for the town, all the land lying within the corporate limits between high tide and the ship channel. The ordinance also charged the President of the Board of Trustees with the duty of executing, on behalf of the town, a grant or conveyance to Carpentier, in accordance with its provisions. Under this ordinance the President executed to Carpentier the grant or conveyance designated, reciting in the instrument the authority under which he acted.

In May, 1853, at the second election under the act of incorporation, five Trustees were again elected, and of them also only four ever qualified. The Board, consisting of the four who qualified, by an ordinance, passed in August, 1853, ratified and confirmed the ordinance of the previous Board, reciting that the consideration, upon which such previous ordinance had been passed, had been "in \*chief satis- [664] factorily paid and performed," and also regranted to Carpentier and his legal representatives the water front of the town, with the right to erect wharves, piers, and docks, and buildings, at any and all points thereon not obstructing navigation.

By an act of the Legislature, passed March 25th, 1854, a municipal corporation by the name of the "City of Oakland" was created, and invested with all the rights, claims, and privileges, and subjected to all the obligations and liabilities of the "Town of Oakland." The present suit is brought by the new corporation, and its object is to set aside and cancel the grant or conveyance to Carpentier, and enforce a surrender of the interests and property transferred or claimed to be transferred thereby.

The suit is, of course, for equitable relief, and the grounds alleged for the interposition of equity are that the grant or

conveyance was obtained by fraud on the part of Carpentier, and was made without authority on the part of the trustees, and that it constitutes a cloud upon the title of the city, and embarrasses her in the exercise of her legitimate functions.

The fraud alleged is that Carpentier obtained the act incorporating the town of Oakland without the consent or knowledge of the people of the town, and for the purpose of acquiring the franchises and lands subsequently granted to him; that at the election held under the act of incorporation he procured the election of himself and "partners in land speculations" as members of the Board of Trustees, and declined to qualify himself, in order to remove a legal obstacle to his obtaining the grant in question; and that the conveyance to him by the President of the Board was, according to an understanding with the Board, to be executed upon the delivery of a bond to reconvey the franchises and lands to the town when requested, but that it was obtained without such bond, upon representations that it was important to the interests of the town that it should be executed at once, in order to be filed before the Board of Land Commissioners, then in session, and that he would give the bond at some future period. No matters are stated in support of the allegation that he "fraudulently procured the election of his tools and agents" in the year 1853, when the confirmation of the ordinance was obtained. It is very evident that [665] the matters thus \*alleged, in order to taint and vitiate the ordinances of the Board of Trustees and defeat the grant to Carpentier, are on their face too vague and general to merit serious consideration. It is of no consequence whether the act of incorporation was procured with or without the knowledge of the people of Oakland. The validity of the public acts of the Legislature is in no respect impaired by the knowledge or ignorance of the parties who may be affected by their operation. And the general charges referring to the election of members of the Board of 1852 and of 1853, so far as the complaint is concerned, rest in mere averment. And in relation to the bond for reconveyance, which it is alleged Carpentier, by an understanding with the Board, was to execute, it is sufficient to observe that the ordinance itself, to which the complaint refers, negatives any under-

standing of the kind. The allegations of the complaint are, as a whole, of so vague and indefinite a character that no relief can be based thereon. When the case was here upon the demurrer to the complaint, the Court observed that the alleged fraudulent practices of Carpentier, in procuring the election of the first, or of the second Board, or the promises or agreements made to induce the execution and delivery of the conveyance from the President, were not fully set out; but as the complaint might be amended on the return of the cause in these particulars, it proceeded to consider the general questions discussed by counsel. It is sufficient to say that the complaint was not amended; and aside from this consideration, the answer fully meets and denies the charges of fraud or fraudulent intent in the acts of Carpentier; and what is of more consequence, the charges are wholly unsustained by the proofs.

Stripped of the charges of fraud the whole claim for equitable relief falls to the ground. The grant was either valid, or void, or voidable. If void, as contended by the counsel of the respondent, there can be no occasion for the interference of a Court of Equity. If void, the condition of things—of the rights, privileges, and estate of the city—remains as though no transfer had been attempted. No cloud is cast upon her title, and no embarrassment can attend the exercise of her legitimate functions. She has only to proceed and assert her privileges and claim her interests, and whoever interferes with them will be a trespasser. If, however, the grant \*is only voidable, and not void, the plaintiff [666] seeking the aid of a Court of Equity can only obtain equity by doing equity—that is, she can only obtain relief from the acts of the agents of the town, by tendering compensation to the defendant, who has relied upon them, for his expenditures. One of the counsel of the plaintiff, in a brief, exhibiting ability and learning, takes the same position in answer to the defendant, who urges this principle against the relief prayed. “The principle invoked,” says the counsel, “is not applicable to a case like the present. It is a rule only in cases where a plaintiff is in Court seeking to set aside some act or contract voidable, but not void, as for fraud, mistake, etc.; or to rid himself of a liability, otherwise valid,

upon a ground which is against good conscience, and not favorably regarded in equity, as usury, gaming, etc. Here our case is that there never was a grant, contract, or act, of any sort, on the part of the town, whatever might have been attempted by her unfaithful agents. As already remarked, she was an artificial being, endowed by the law of her creation and existence with certain limited powers and functions, and utterly incapable of acting or even of being beyond or against these, to any intent or purpose whatever."

The conclusion which follows from the views we have expressed is evident. The charges of fraud, as a ground for the equitable interposition of the Court, are fully answered, and must be left out of the case. If the ordinances of the Board, granting the franchises and lands to Carpentier, are void, there is no occasion for the interference of equity. If they are only voidable, that interference cannot be invoked until equity is done by the party claiming it—that is, by placing or offering to place the party relying upon the acts of the agents of the town in the same position which he would have occupied but for his reliance upon their validity. These views dispose of the case, and render it unnecessary to consider the other points made by the appellants.

The judgment of the Court below must therefore be reversed, and that Court directed to dismiss the suit, and it is so ordered.

[667] \*The plaintiff filed a petition for a rehearing, upon which NORTON, J. delivered the opinion of the Court—COPE, C. J.<sup>1</sup> concurring.

The plaintiff asks a rehearing in this case, upon the ground that when the case was before this Court on a former occasion it was decided: first, that the action could be sustained without an offer by the plaintiff to do equity; and, second, that although the transfer to the defendant was void, it was a proper case to ask the transfer to be set aside by the equity

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<sup>1</sup> Mr. FIELD having been appointed an Associate Justice of the Supreme Court of the United States resigned the office of Chief Justice May 20th, 1863. Mr. CORN succeeded him as Chief Justice. The opinion on the rehearing was not filed until June following.

powers of the Court, and that these decisions have become the law of the case, and cannot now be reversed.

In the former decision the complaint was held to be sufficient, upon the ground that the transfer was absolutely void. Nothing was said as to whether it would have been sufficient without an offer to do equity, if the Court had considered the transfer not void, but only voidable. Afterwards the opinion was modified, by reserving for future revision the question of the validity of the contract with Carpentier. This was a reservation of the whole question as to its validity, as well whether it was voidable as whether it was void. The question whether or not the transfer was voidable being thus withdrawn, no decision can be inferred as to what would have been necessary to render the complaint sufficient, in case the Court should consider the transfer only voidable.

It may be argued that when this question was withdrawn from the opinion, there was no ground specified in the opinion upon which the decision was made; but if this may be so, it does not follow that the decision necessarily involves a determination of a question which was not only not mentioned, but the basis for which was withdrawn from the opinion; and so, although it was said in that opinion that it was a proper case for equitable relief, considering the transfer absolutely void, yet when the ruling that the transfer was void was withdrawn from the opinion, the remark that it was a proper case for equitable relief became merely *obiter*, and \*decided nothing. At most, it could be considered [668] as only saying what would be the opinion of the Court in case, upon a revision of the question on some future occasion, the Court should hold the transfer void.

Rehearing denied.

# PEOPLE *ex rel.* FRANK v. THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO.

**CONSOLIDATION ACT, EFFECT OF.**—The corporation, the City of San Francisco, was not destroyed by the Consolidation Act, but continued. Its name only was changed, and the change in this respect did not require any alteration in the pleadings or any suggestion of record in an action pending against the city at the time the act was passed.

**IDEM.**—Where an action was commenced against the City of San Francisco previous to the passage of the Consolidation Act, but judgment was not recovered until after the passage of the said act: *Held*, that the judgment was binding against the existing corporation, the City and County of San Francisco.

**IDEM—INDEBTEDNESS OF CITY.**—The provisions of the fourth section of the Consolidation Act, respecting the preëxisting indebtedness of the city of San Francisco, was not a mere legislative declaration of good faith towards the public creditors, but a requirement imposing upon the Board of Supervisors the duty of providing for the payment of that indebtedness.

**IDEM—AUTHORITY OF SUPERVISORS.**—The Board of Supervisors of the City and County of San Francisco have authority, and it is their duty to provide for the payment of judgments recovered against the city of San Francisco. They have no discretion except between two courses of procedure. They must either appropriate for this purpose money already in the treasury, or they must raise the money by taxation.

**IDEM—MANDAMUS LIES.**—*Mandamus* is the appropriate remedy to enforce the performance of this duty by the Board of Supervisors.

**IDEM—PASSAGE OF ORDINANCE.**—There being no discretion as to the duty to be performed there is none as to the use of the means required in performing it. If the means require the passage of an ordinance, the Supervisors have no discretion to refuse to pass the ordinance. They have not in such case the right to vote at their option either for or against the ordinance.

**IDEM—AUDITING CLAIMS.**—Section ninety-five of the Consolidation Act, with reference to auditing claims, does not apply to judgments recovered upon the preëxisting indebtedness of the city.

**IDEM—CONSTRUCTION.**—The restrictive clauses of that section and of other sections of the act must be read in connection with the fourth section and receive such a construction that the provisions of all may stand.

**IDEM—PAYMENT OF CITY INDEBTEDNESS.**—In imposing upon the Supervisors the duty of providing for the payment of the city indebtedness, the Legislature [669] authorized them to take all the ordinary measures essential to its complete performance. The duty carries with it the means. The Board can appropriate from the revenues or levy a tax, and the adjusting of the details is a mere matter of administration, which can be had under the direction of any of the officers of the corporation designated for that purpose.

## APPEAL from the Twelfth Judicial District.

This was an application for a writ of *mandamus* to compel

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· Approved as to *mandamus*, in *People v. Supervisors*, 28 Cal. 431; cited as authority in *People v. Supervisors*, 36 Cal. 604, citing many cases; and cited as authority in dissenting opinion, in *Tilden v. Sacramento County*, 41 Cal. 77. See 39 Iowa, 145; 77 Ind. 545; 86 Ind. 41.



the defendants to make provision, from the revenues of the City and County of San Francisco, for the payment of a certain judgment obtained against the City of San Francisco, and in case said revenues are insufficient for said purpose, to levy a tax for the payment thereof, as provided in section four of an act entitled "An Act to Repeal the several Charters of the City of San Francisco, to establish the Boundaries of the City and County of San Francisco, and to Consolidate the Government thereof," approved April 19th, A. D. 1856.

The cause was heard upon the affidavit of the relator and the answer of the defendants. The affidavit of the relator sets forth:

1st. That on the eighteenth day of December, 1854, the City of San Francisco was indebted to one Henry W. Seale, in the sum of \$58,611 39;

2d. That on the fourteenth day of February, 1854, the said Seale instituted a suit against the City of San Francisco to recover said indebtedness;

3d. That on the twenty-seventh day of April, 1857, the Superior Court rendered a judgment against the said City of San Francisco, and in favor of Seale, for the said sum, with interest thereon from the eighteenth day of December, 1854;

4th. That said suit was afterwards appealed by the said City of San Francisco to the Supreme Court of the State of California, and that on the third day of July, 1860, said judgment was confirmed by the Supreme Court, with costs, and is now final and unpaid;

5th. That said debt was due by the City of San Francisco at the time when the Consolidation Act (passed April 19th, 1856) was approved;

\*6th. That in and by said Consolidation Act all [670] the property of every kind and nature belonging to the City of San Francisco became the property of the City and County of San Francisco, that it was received and accepted by said city and county and has ever since been used by said city and county;

7th. That there is, and at the time of the demand made by the relator was, in the treasury of the City and County of San Francisco, of the revenue of the fiscal year ending June,

1862, a large amount of money, more than sufficient to pay the amount due upon said judgment, unspent and unappropriated;

8th. That said judgment has been duly assigned to the relator, (the assignments are specially set forth,) and that he now is, and at the time of making his demand was, the owner of said judgment;

9th. That the relator, on the twentieth day of October, 1862, duly demanded of the said Board of Supervisors of the City and County of San Francisco, in a regular and public session of said Board, to make provision for said indebtedness according to the provisions of section four of the Consolidation Act;

10th. That said Board of Supervisors has neglected, delayed, and refused to do so; and

11th. That there is not any plain, speedy, and adequate remedy to the relator save by the writ of mandate in such cases made and provided.

The answer of the defendants contains:

1st. A denial upon information and belief that the City of San Francisco was indebted to Seale in any sum on the eighteenth day of December, or at any other time;

2d. An admission of the commencement of the action at the time set up in relator's affidavit, and the rendition of the judgment as therein alleged;

3d. An averment that said judgment is null and void, because at the time of its rendition the charter of the City of San Francisco had been repealed, and that the corporation known as the City of San Francisco had no legal existence;

4th. An admission that the judgment was appealed to the Supreme Court, and there affirmed as set up in relator's affidavit, and an averment that said appeal was unauthorized, because said City of \*San Francisco had no legal existence, and no power to appeal, prosecute, or defend the said or any other action;

5th. An admission that said judgment is unpaid, and a denial that it is due;

6th. An allegation that defendants have no knowledge or information save what is contained in relator's affidavit, whether the relator is the owner and holder of said judg-

ment, and that defendants neither admit nor deny the same, but that they insist that the relator shall be required to make strict proof thereof;

7th. An allegation that on advice and belief the Board of Supervisors have no power or authority to pay, or order paid, or audit, allow, or make provision for the payment of said judgment;

8th. A plea in the nature of a demurrer to the demand alleged by relator; and

9th. An allegation that at the time when the said affidavit of the said relator was made—namely, at the time when the said proceedings in this behalf were instituted and commenced—there were and still are outstanding and unpaid claims against the late City of San Francisco of the like class, and of equal validity with the said judgment described by the said relator, to the amount of over \$1,300,000—that is to say, judgments upon alleged claims against the said, the late, City of San Francisco, upon which the said, the late, City of San Francisco was duly impleaded before the passage of the said so-called Consolidation Act, and upon which judgments were thereafter obtained, after the passage of the so-called and described Consolidation Act, without the substitution of the said City and County of San Francisco upon the record, but upon consideration of law, justice, and equity, equal at least to those upon which the said judgment, described by the said relator, is founded.

The following are sections one and four of the act known as the Consolidation Act, which are referred to in the opinion of the Court:

“SEC. 1. The corporation, or body politic and corporate, now existing and known as the City of San Francisco, shall remain and continue to be a body politic and corporate, in name and in fact, by the name of the City and County of San Francisco, and by that name shall have perpetual succession, may sue and defend in all \*Courts and places, [672] and in all matters and proceedings whatever, and may have and may use a common seal; and the same may alter at pleasure, and may purchase, receive, hold, and enjoy real and personal property, and sell, convey mortgages, and dispose

of the same for the common benefit. The boundaries of the City and County of San Francisco, and all sides except the southern boundary, described in this section, shall be identical with those of the County of San Francisco as they exist at the time of the passage of this act: The southern boundary of the City and County of San Francisco shall be as follows: beginning in the boundary line of the County of San Francisco, as it now exists at a point due east from a rock in the bay of San Francisco, southwesterly from Point Devisidero or Hunter's Point, which rock is designated on Wheeler's map of said county as Shag Rock; thence running due west to said Shag Rock; thence running westerly to a point in the county road, one-fourth of a mile, northeasterly in a straight line from the house known as the County House, kept and occupied by C. E. Lilly; thence in a straight line to the southeastern extremity of the southern arm of the Laguna de la Merced; thence due west to the Pacific Ocean, and thence due west to the western boundary of the County of San Francisco as it now exists; *provided, however*, that all rights and liabilities of the corporation heretofore and now known as the City of San Francisco shall survive to and continue against the corporations continued by this act."

"SEC. 4. All the existing provisions of law, defining the powers and duties of county officers, excepting those relating to Supervisors and Boards of Supervisors, so far as the same are not repealed nor altered by the provisions of this act, shall be considered as applicable to officers of the said City and County of San Francisco, acting or elected under this act. Provision shall be made from the revenues of the said city and county for the payment of the legal indebtedness of the former city corporation and of the County of San Francisco. The taxes which may be levied and collected under the provisions of this act shall be uniform throughout the said City and County of San Francisco; but in case it should hereafter be found necessary, for the purpose of providing for the said city indebtedness, to increase taxation [673] beyond the rate of the county \*tax levied upon property in said County of San Francisco, during the year 1855, such increased taxation, over and above the rate aforesaid, shall be levied and assessed exclusively upon the

real and personal property situated within the limits defined in the second section of the act entitled 'An Act to Reincorporate the City of San Francisco,' passed May 5th, 1855, and not upon such property situated without those limits."

The Court below refused to grant the writ, and gave judgment on the application for the defendants. From this judgment the relator appeals.

*John B. Felton and A. M. Crane, for Appellant.*

It will be perceived that none of the allegations of the answer contradicts the allegations of the complaint, or raises any question of fact. It is true that the original indebtedness, on which the judgment described in the relator's affidavit was rendered, is denied, but as the rendition of the judgment is admitted, the denial is evidently sham and evasive. By the force of the judgment of the highest tribunal of the land the indebtedness has become *res adjudicata*, and the defendants cannot deny it now. So, also, the defendants say that they neither deny nor admit the allegation that relator is the owner and holder of the judgment described in his affidavit, and insist on strict proof. But the relator's affidavit is positive upon the subject, and is a sworn complaint to which defendants must answer as to any other sworn complaint. Even at common law the rule was that the return to a *mandamus* must be certain and conclusive. This point was decided on the same sort of allegation in the very learned case of *Commonwealth ex rel. Thomas v. Commissioners of Alleghany County*, 8 Casey, 32 Penn. 232, where the Court says: "The fourth plea is a sort of conjectural interrogatory as to whether the relator is a *bona fide* holder of the bonds he claims. His title is not exactly denied or admitted, but we are asked to put him to a proof of it. We cannot do it on so uncertain and equivocal a plea. He alleges positively that he is the owner, and until it is positively denied he cannot be required to prove his title."

Taking then the affidavit of relator and the answer together, and \*we have this state of facts: That Seale [674] commenced an action against the City of San Francisco, in the year 1854, in a Court of competent jurisdiction; that he recovered judgment in the year 1857, and that said

judgment was confirmed by the Supreme Court in the year 1860; the judgment was recovered against the City of San Francisco, and the Consolidation Act establishing the City and County of San Francisco went into effect in the year 1856, and during the pendency of the action; that there is money in the city treasury, from the revenues of a past year, amply sufficient to pay this judgment. On this state of facts the relator contends that he is entitled to a peremptory *mandamus* to compel the payment of his judgment.

I. The former City of San Francisco and the present City and County of San Francisco are one and the same corporation, so far as debts, liabilities, judgments, suits, right to sue and defend, are concerned.

In *Seale v. The City of San Francisco*, the very case which is described in relator's affidavit, the direct point was raised and decided by this Court, so that, as far as this case is concerned, the matter is forever a *res adjudicata*. The same point was taken in behalf of the City of San Francisco in the cases of *Argenti v. The City*; *Chrysler v. The City*, and *Martin v. The City*.

This point was also decided in the case of *Smith v. Morse*, 2 Cal. 554. The Act of April 15th, 1851, had repealed the Act incorporating the City of San Francisco, passed April 15th, 1850, and considerably enlarged the boundaries of the city, and the point was taken, "That the Act of April 15th, 1851, reincorporating the City of San Francisco, repealed the old corporation, and consequently its debts became extinguished and its property escheated to the State. That the State in the exercise of her sovereignty has reconveyed the property of the city to the Fund Commissioners, coupled with the condition of the payment of the floating debt of the city." To this Murray, C. J. said: "It requires no little courtesy to discuss this proposition seriously, even for a moment, and the whole mistake has grown out of a failure to distinguish the difference between the body politic as a corporation, and the act constituting it a corporation. The title of the act [675] is, 'An Act to Reincorporate the City of San Francisco.' The first section provides: 'The people of the City of San Francisco shall continue to be a body politic and corporate under the name and style of the City of San Francisco.

“By the first charter the people of San Francisco are constituted a body politic; the second continues—not destroys—the body so founded. In the language of Lord Mansfield, ‘It has never been disputed that new charters revive and give activity to the old corporation. Where the question has arisen in which there was any remarkable metamorphosis, it has always been determined that they remain the same as to debts and rights.’ \* \* \* In fact the Legislature possesses no such arbitrary power to seize the revenues and property of a municipal corporation. If they had, by what authority—the debt having once been destroyed—can they again revive and impose it upon this city, and authorize a tax to be levied upon the corporators for its payment? The construction contended for is at war with the plain and obvious meaning of the Legislature. And even if such were the intention, it would be but doing indirectly what I have already shown they cannot do directly, and would therefore be unconstitutional and void.”

The Court will remember that in the case of *Smith v. Morse* an execution, issued on a judgment obtained under the charter of 1850, had been levied upon the property of the city under the charter of 1851, and the property had been sold. Large quantities of the water lots of the city are still held under this decision, and to disturb it would be to overturn the title to millions of dollars of property.

The identity of the City and County of San Francisco with the City of San Francisco was decided in a very striking manner in the case of *Knox v. Woods*, 8 Cal. 545. There the Court held that an account audited against the City of San Francisco need not be audited again under the Consolidation Act to entitle it to be paid by the City and County of San Francisco.

How well this point was considered as settled is apparent from the case of *Zottman v. The City of San Francisco*, where the Court treats the liability of the City and County of San Francisco, \*as a matter of course, for the debts [676] of the old corporation. The Court there say: “The liabilities of the City of San Francisco having been cast by the Consolidation Act upon the defendants.” (20 Cal. 100.)

This point therefore has been so often decided, directly

and indirectly, that it is no longer an open one. Even, however, if it were, the decision must still be the same.

The language of the Consolidation Act is clear and unmis- takable on this point. There is no ambiguity in the statute. The first section of the Consolidation Act declares that, "The corporation or body politic and corporate, now existing and known as the City of San Francisco, shall remain and continue to be a body politic and corporate, in name and in fact, by the name of the City and County of San Francisco, and by that name shall have perpetual succession, may sue and defend in all Courts and places."

Again, at the end of the first section: "*Provided, however,* that all rights and liabilities of the corporation, heretofore and now known as the City of San Francisco, shall survive to and continue against the corporations continued by this Act."

The objections most urged by respondents' counsel are: 1st, that the new corporation is entirely dissimilar to the old one in the powers which are conferred upon it; 2d, that the new corporation includes a larger space of territory, and that, although such fact is not proved and does not appear either in the record or law, there are persons included in the new corporation who were not in the old; and 3d, that the new corporation includes the former corporation of the county, and that the corporation, the county, cannot be bound by a judgment against the city without having an opportunity of defending itself.

These objections may be answered together. A corporation is the creature of the Legislature, and under constitutional restrictions, is what the Legislature makes it. The Legislature has the right to consolidate two or more corporations into one, so that the composite corporation shall be legally identical with each of the corporations which have been put together. Thus, in American Railway Cases, 69, in the cases cited there, it was held that a railroad [677] \*company made up of four or five companies, formerly existing as distinct companies, was yet the same as each of the former companies.

So, also, the Legislature has the right to extend the territorial limits of a corporation. This was done in 1851, when the charter of 1850 was abolished and the limits of the



city were extended. So, also, the powers from a corporation all the powers conferred upon it entirely new and different, the powers of the corporation remain the same. (S. 241, 242, 246; 2 Mason, C. C. 1. *Corporation, Mees & Welsby*, 621; *v. The Mayor and Aldermen of the City of New York*, 336; *The Overseers of the Poor v. David Sears*, 22 Pick. 122; *The City of New York v. Allen*, 13 Missouri, 401; *Daniel v. Memphis*, 11 Humph. 582; and *The Mayor, Aldermen, etc., of New York v. The Mayor, Aldermen, etc., of New York*, 11 Humph. 582.)

II. It is the duty of the City to pay the judgment held by the Court, if she has sufficient on hand, and if not, then to levy a tax for the purpose. This is pointed out in section four of the Charter. It is the duty of the Board of Supervisors to provide for the payment of this debt.

1st. The city has been sued in the Supreme Court, and that Court has awarded judgment, and that Court has awarded and adjudged that the city should hold that a Court which has the power to pay its debts has no power to refuse to pay if it is disobeyed, is simply to take the hands of the Court. On what ground? Certainly not on the ground that the Court has no power to enforce corporations to discharge their debts. Certainly not on the ground that such judgments are not in their effect. If a municipal corporation is ejected and the plaintiff recovers, the city is forced to leave the premises, and therefore, the right to enforce its judgment is an exception in favor of money judgments. The Court has a right to enforce a money judgment, and only means possible in the case of a corporation, their money by taxation, and that is the only way, or, if there are none, by taxation. Courts have to order a thing done, and they have the right to compel that thing to be done.



2d. Again, this power of the corporation to appropriate its revenues to the payments of its debts is necessarily implied in its power to make contracts and incur liabilities. What is a contract? It is the assent of two minds, legally binding and enforceable on both. Now, the law which gives to a corporation the right to contract gives to it the right to put itself in a position where it can be forced legally to comply, if it refuses. The Legislature, in giving to a corporation the right to make contracts and incur liabilities, and in subjecting it to the authority of the Courts to compel a performance of contracts and a payment of liabilities, by a necessary implication gives to the corporation the right to raise money in the ordinary and customary way for the purpose of meeting its contracts and liabilities, and, by an equally necessary implication, gives to the Courts the power to force it to raise money if it refuse to comply with their legal commands.

3d. The Legislature has not only conferred indirectly this power on the corporation of the City and County of San Francisco, but it has also done so in the clearest and most unmistakable language.

By the act the liabilities of the City of San Francisco survive and continue. They have never died. Their position has never changed. Two stronger words, to have the effect which the Legislature evidently intended to have, that of saving these rights and liabilities from even a momentary abatement, could not be selected than these words—survive and continue. And for these liabilities a fund is provided, and that fund is the revenues of the City and County of San Francisco, and taxation if the revenues are insufficient; and that taxation is to be apportioned in the way which the Legislature evidently regarded as the equitable one, in a [679] certain \*proportion upon the inhabitants of the City of San Francisco and of the County of San Francisco. And finally, the power and duty to do all this is devolved upon the Supervisors.

It is argued on the other side that all of these provisions are but simple declarations of good faith on the part of the Legislature; that it is a pledge that at some future time another act shall be passed giving to some one the power of

paying these liabilities, but that provision.

But it is clear that the Legislature in this Consolidation Act, to management of these liabilities. It is justice of the opposite construct give all the property rights and incorporation to the corporation as vision for its liabilities.

Examining the act in the light of justice, we see that the language is left as they were before. their payment. The fund is provided the city shall pay and the county in other words, the very details of the payments are arranged. How is all that the Legislature intended to say to the creditors, "At some future time containing these provisions?"

If the Legislature intended to do nothing, and to do nothing would it have to dictate how that this is but a declaration that passed making provision for the in what way can the Legislature passed, that it shall contain a provision to be made out of the revenues of taxation shall be made in a certain two provisions: 1st, that these revenues of the city and county purpose shall be apportioned in proportions of a declaration that hereafter they are positive peremptory provisions of mode of payment and of raising money.

\*Again, such a construction is conditional. The former acts incorporated San Francisco contained provisions for very debts out of the revenues of these revenues should be raised of 1850, art. 3, sec. 29; Charter

It was on the faith of these provisions that the city was trusted. The relator's affidavit shows that this indebtedness accrued in 1854. The judgment creditor had, therefore, a vested right to be paid out of these very funds, to be raised in this very manner, and a subsequent Legislature cannot take away this right. (*English v. Board of Supervisors of Sacramento County*, 19 Cal. 172; *Smith v. Morse*, 2 Id. 524; *The People v. The Board of Supervisors of the County of Westchester*, 4 Barb. Sup. Court R. 64.)

It is, however, objected to this that no machinery is provided, and that the provision does not sufficiently indicate the mode and manner to make it practicable to carry it into effect.

To this we answer: 1st, that if the general power to make this provision for the payment of the debts, and to tax in a certain manner is given, such general power carries with it the power to take all the necessary steps. It is a general fundamental principle that where a right is given all necessary powers to the exercise and enjoyment of the right are also given. 2d. We answer that the machinery is provided, and the Revenue Act (see Stat. 1857, sec. 42, p. 339) provides how a tax shall be levied. All therefore that was necessary was to give to the Board the power to direct the tax.

Again, it is urged that section ninety-five of the Consolidation Act provides that payment of demands on the treasury of said city and county, duly audited, may be made for certain specified objects "and none other," (see Act of 1856, 172,) and that this provision prohibits the application of the money in the treasury to the payment of these debts, as they are not specially mentioned.

To this we answer: 1st, that this provision only applies to the future government of the city, not to its past transactions; and 2d, that in this provision as to what demands are to be paid out of the treasury, the act has omitted judgments altogether, for the clear \*reason that it was unnecessary to specify them. The law orders the payment of judgments. The section only deals with those demands which the Supervisors and Auditor pass upon—with contracts which the law authorizes the city to make and then pay without suits.

It is further objected that our demand is insufficient. On

this point we will simply call the very learned case in 8 Casey, 232

III. *Mandamus* is the proper performance of the duty imposed by jurisdiction of the writ comprehensive of common law, of statutes and acts where there exists no legal remedy. The idea was that a *mandamus* would be granted for the performance of a ministerial duty. It has gone much further, and it is now granted to command the performance of any public duty. (Tapping on *Mandamus*.)

The statute of this State gives the English rule. It is unquestionable that these cases are proper subjects of the writ, 142, that it is within the jurisdiction of *mandamus*, that all the officers should do their duty in their public offices.

The same rule applies to parishes. The same author (page 257) that on the Court will grant the writ to assessments, etc., and (page 259) to pay principal and interest bonds of overseers of a parish within an act of the expenses of the union to those who have not sufficient funds in their hands to do forthwith what is necessary and levying a rate for that purpose and amount thereof to the Treasurer. cited to sustain the text: *R. v. D.* 553; *Id.* 12 B. 185, where see *v. St. Andrews*, 10 A. & E. 736. other cases are referred to with the Supreme Court of Pennsylvania in the opinion in the case of *Commonwealth v. State R.*, 10 Casey, 496; see also *Co.*, 32 Penn., 8 Casey, 218, direct cases, and many others which we

will be seen that municipal corporations are subjects of this writ; that the officers controlling them are public officers, and therefore subject; and that in cases precisely analogous to this they have been held to obedience to the writ. The principle is, that exercising functions with which the law invests and charges them, they may be coerced to discharge those functions according to law.

All of the authorities, without a single exception, maintain the proposition that in the absence of any legislative direction to pay, or to provide for payment of a municipal debt, the fact of the existence of the debt without provision for its payment, when demand is made and refused for such provision, is sufficient to authorize *mandamus*. Upon principle, this is and should be so. A judgment is conclusive of the fact of indebtedness, and that the corporation had a right to contract the debt; and the contracting of it carries the obligation to pay, and with this the use of the proper means to pay. No higher duty can be imposed upon any being, legal or artificial, than the duty of doing justice; and if any duty can be compelled by superior authority, it would seem to be the duty of doing justice. But positive authority is abundant to support a principle so obviously just. (*State v. Poulterer*, 16 Cal. 531; *Sedg. on S. and C. Law*, 91, 92; *Carroll v. Board of Police*, 6 Cush., Miss., 38; *Board of Police of Attala County v. Grant*, 9 S. & M. 92; *Taver v. Commissioners of Tallapoosa County*, 17 Ala. 532.)

It is urged that the relator, having recovered his judgment, might, for anything that appears, have enforced it, or might still enforce it by *feri facias* process entirely adequate to the purpose.

To this we reply: 1st, that there is no intendment in favor of a municipal corporation—that it has leviable property sufficient to pay its debts. The petition expressly charges that the relator has no adequate and sufficient remedy; [683] and this charge is not \*denied, and this is enough for all purposes of obtaining the writ. This has been expressly held in the two cases from Pennsylvania, above cited, to be all that is necessary.

2d. The other remedy, excluding this, must be a remedy for the enforcement of the very right claimed. Now, here

we are not seeking to enforce the judgment, but to enforce the statutory duty cast upon the Supervisors of the city and county to pay the debts of the city, the Supervisors being in this respect the representatives of the old corporation. The statute cast the duty of levying a tax for the payment of these debts; the creditors had a right, therefore, to look to this fund for payment of their debt. Even if there were a clear remedy for the enforcement of the judgment, this would be no answer to this application, any more than it would be a good answer that the Sheriff need not execute a deed because there was property of defendant to make the debt. The judgment is one thing binding the old corporation; the duty to levy a tax to pay it is another thing, binding the new corporation; and we are seeking now to enforce this new statutory obligation, and for this last breach of duty we have no specific remedy, indeed no adequate remedy at all, except in this form.

3d. The primary fund for the payment of the debts of the old corporation is the money in her treasury, and the appropriate means to get it there taxation. The whole policy of the law, as shown in the old charter and the new, is that the public property shall not be sold to pay the debts. It is notorious that the city has no property subject to forced sale, except land; but she cannot sell that, or any property—she can only lease for three years. Can it be possible that the Legislature meant that the city should, by the mere failure to provide for the payment of these debts, as she is bound to do by the law, permit the public lands to be sacrificed at a forced sale by the Sheriff? Is it not a violation of the duty of the Supervisors to suffer the sacrifice? And can that be considered a legal remedy, adequate and sufficient, which thus contravenes this duty and imposes this unnecessary loss upon the city?

Another answer is, that the judgment itself, as held in the Mississippi case cited, taken in connection with the duty imposed by law, is a command for the levying of the tax; and still another, as \*held in the Pennsylvania case, [684] 8 Casey, that the number of the debts makes the process of suing on them all at law an inadequate and inadmissible remedy—the argument being that it unnecessarily sub-

jects the creditor to delay and the corporation to expense. To all which it may be added that here the new corporation, having received the assets of the old, has contracted a direct engagement with the State and the creditors of the city to pay her debts; and that this obligation is a different thing from the liability of the old corporation or of the old remedies—a new obligation and a new contract, with a new party, on a new consideration. (3 Black. Com. 100; Tapping on Mand. chap. 3, pp. 9, 10; also citing 8 Casey Sup., Angell & Ames on Corp. sec. 707.)

It is also urged that inasmuch as provision can only be made for the payment of the judgment of the relator by the Supervisors by an ordinance, they cannot be controlled in the matter by *mandamus*; that the right of voting necessarily implies a discretion as to how the vote shall be given, whether aye or no, which cannot be interfered with by the Court.

To this we answer, that most corporate acts require to be done by vote, or by some indication of the will of the members of the Board; and if the argument be good, it must follow that *mandamus* could never, or at least very seldom, lie against a Board like this. But if the duty be plain, then the plain duty is to vote to do it. There is no discretion as to the mode of voting, when there is none as to the result. If otherwise, then for all practical purposes these bodies would be despotic. What was required of all the Boards in the large list of cases cited? What becomes of *English v. Supervisors of Sacramento*, where they were required to lay a tax? and especially of the case of *O'Donnell*, and other cases in this Court?

The Board is a unit, though composed of different members; and though several persons act, yet those persons make but one body. If one man or officer owed this duty, *mandamus* would lie, but if several owe it, it will not—the remedy depending not on the right but on the number of people who compose the body owing the duty, and their mode of doing their business. We deny that voting implies discretion any more than any other sort of corporate action. It may be doubtful whether, the duty being ministerial, any  
[685] voting \*is necessary to the payment of a judgment—the law in pronouncing the judgment being the highest mandate and authority for such payment.



The case of *The People ex rel. Lynch v. The Mayor, etc., of New York*, 25 Wend. 684, is cited. But it is not in point. There the claim was not on a judgment, and a judgment, for all that appears, would have been as effectual as *mandamus*. Here *mandamus* is the only effectual remedy to get the money. No intimation is made that *mandamus* would not lie to compel payment of a judgment. The suggestion about the appropriation, etc., has no application to this case—for here the direction is general to make provision for debts, etc., and no restriction placed on the action of the Supervisors, and no discretion given. Besides, the last paragraph of Judge Nelson's opinion is a mere suggestion of his and not necessary to the decision, and is wholly without foundation in law, as will appear by reference to late cases. It would deny a *mandamus* for any sort of refusal to pay money by a Common Council or any corporation, public or private. If effect were given to it, there can be no responsibility enforced when the liability is admitted, and the plainest duties cast by law upon such bodies. The doctrine would be equivalent to a Bankrupt Act for corporations.

But this dictum of Judge Nelson is controlled by the case of *Ex parte Lynch*, 2 Hill, 45. This was another application by Judge Lynch for a *mandamus* to compel the Mayor and Supervisors of New York to pay his salary. Between the first application, reported in 25 Wend. 684, and the present one, an act had been passed by which the Mayor, etc., as Supervisors, are directed to audit and allow the salary of the Judge. The phraseology of the old act was amended; but the same official action, viz., the passage of an ordinance by vote, was required to get the money out of the treasury as before. The Court say: "There would be no difficulty in granting the writ now," and then go on to rule that as the party has an adequate remedy by action, the writ of *mandamus* is denied.

The Court very properly held that where there was no discretion left by statute over the subject matter of the appropriation, the assent of a majority by vote could be coerced and directed by *mandamus*.

\*If, however, the Court think there is anything yet [686] remaining in the remark of Judge Nelson worthy of

consideration, we would call their attention to numerous cases more directly bearing on this point. We merely refer to that large class of cases holding that a society may be compelled by *mandamus* to receive a member by vote whom they have expelled by vote, or have refused to admit by vote. (1 Hill, 665; 24 Barb. 570; 12 Cush. 402.)

In the matter of *Bright v. The Supervisors of the County of Chenango*, 18 Johns. 242, the Supervisors twice refused, and they must have refused each time by a vote, to allow the account of the Clerk of the county for advances made by him in purchasing books for records. They were compelled by *mandamus* to allow the account; that is, they were compelled to vote "yes" on a question on which they had voted "no" at two regular meetings.

In the case of *The People v. The Supervisors of Chenango*, 4 Selden, 317, the Board had refused to issue warrants for the collection of the tax provided by the militia law. On the application of the relators, writs of *mandamus* were issued to the Board of Supervisors, requiring them to reassemble and cause the military roll of the towns within the military command to be compared with the assessment rolls, and to issue warrants for the collection of the tax required by the act, and the judgment of the Supreme Court was affirmed by the Court of Appeals.

The case of *The People v. The Common Council of Brooklyn* was an application for a peremptory *mandamus* to compel the defendants to proceed in the matter of the widening of Fulton Street, in the city of Brooklyn, and to complete the same. The Common Council had adopted a resolution to the effect that all proceedings in widening Fulton Street be discontinued, but a *mandamus* went to them commanding the defendants to proceed with the work. (22 Barb. 404.)

But the late case (1861) of *The People v. The Common Council of Syracuse*, covers the whole ground. This was a motion for a peremptory *mandamus*. It appears that the Common Council passed a resolution directing the Commissioners to assess the amount awarded for damages to the owners of property taken for the opening of a street.

[687] This resolution was vetoed by the Mayor, and \*failed to command a majority sufficiently large to pass it

against the veto. The order of the Court was, that a peremptory *mandamus* should issue to the Common Council, requiring that body to proceed and direct the Commissioners making the award to assess the amount awarded for damages. (20 How. Pr. 491; S. C. 32 Barb.)

The Court remark that, "while the Common Council have any discretion to proceed or to discontinue, this Court will not interfere to overrule their proceedings. It is only when the Common Council neglect a plain duty enjoined by law that this Court undertake to compel them to proceed by *mandamus*."

This is the only use of the word "discretion" in the case. The point that the Supervisors had a discretion to vote "aye" or "no" was not alluded to by Court or counsel in this case, or any of the preceding cases; and the plain result of the *mandamus* in the last case was to compel a number of the Supervisors to vote "aye" on the resolution which had been previously lost, and on which they must have voted "no," sufficient to pass it over the veto of the Mayor, or to compel that functionary himself to vote "yes" on a resolution he had vetoed a little while before.

If voting is necessary, there can be no doubt that, since the Supervisors of the City and County of San Francisco are under obligation to do a specific act, which obligation has been determined beyond question or appeal by the highest record evidence known to the law, the action required is merely the exercise of a ministerial power, and the judgment of the city officials can be controlled and directed by *mandamus*. (*Hempstead v. Underhill*, 20 Ark. 337.)

*D. Lake and J. W. Dwinelle*, for the Respondent.

I. The existing corporation, "The City and County of San Francisco," is not identical with the former "City of San Francisco," and the judgment rendered against the former corporation is not binding upon the present one.

This is not a question involving a mere name. The name may be changed and the corporation remain the same. The name may remain the same and the corporation lose its identity. If this act had merely continued that one corporation, with greater or smaller \*territorial limits, [688]

or greater or lesser powers and capacities, we should not deny that the new or continued corporation was perfectly identical with the old, or to use the language of the act, (sec. 4,) "the former city corporation." Such were the cases cited by appellant, and the same principle is announced in *Bellows v. President, etc., Hallowell Bank*, 2 Mason, C. C. R. 31; *Rex v. Pasmore*, 3 Durn. & East, 241; *Hopkins v. Swansea Corporation*, 5 Mees. & Welsby, 621; and does not need reiteration. Such also was the effect of the former acts reincorporating the City of San Francisco. (Laws 1851, chap. 84, p. 357; Laws 1855, chap. 197, p. 251.) In those instances, the identity of the corporation was continued and maintained.

But in the case of the City of San Francisco under the Consolidation Act, there was effected, not merely the continuance of one corporation, but the continuance of two corporations, and not merely the continuance of two corporations, but the union of those two corporations into one. The City of San Francisco did not cease to exist as a corporation, but it continued its existence under the absolute condition of uniting with it another artificial person and corporate entity, whose existence and personality were as complete and distinct as its own. The new corporation, therefore, presented in its very essence a quality which rendered an actual identity with the "former corporation" impossible; for it represented not only the former corporation but more, and twice as much, and that not merely of territory, capacity, or property, but of distinct corporate entity.

By the act, both of the corporations were declared to continue. Neither lost its identity, but that identity extended to only one-half of the new corporation; nor did either transmit any portion of its identity to the other. The only legal analogy to which the results of this union can be compared, as they are announced by the Legislature, is that of death and administration. The old city corporation, not only in name but in form and essence, ceased to exist. It was continued *sub modo* under a new name, and in union with another corporation. The liabilities of the former corporations were declared to "survive" against the new dual corporation. All the property of the former corporations [689] was transferred \*to the new corporation. The new

corporation therefore became the administrator of the two "former" ones, liable for all their debts and entitled to all their assets. But as not only another corporation was added to the "former corporation of the City of San Francisco," but also another and distinct body of corporators, it follows that this other corporation and new body of corporators, upon whom were thus thrown the liabilities of the former corporation of the City of San Francisco, had a right to contest those liabilities, so far as they had not become absolutely fixed by judgments already rendered, or audits already made, for two reasons: 1st, they had a right to the benefit of any excess of property conveyed to them above the liabilities imposed upon them; 2d, they had a right to protect themselves, if possible, against a deficiency of assets provided to meet those liabilities. How could this be done without the right to litigate pending suits not yet in judgment? And how could they be litigated, when the new corporation was not made a party to the record—only one-half of its constituent parts being represented in Court—and that when every law by which that half ever had the power to appear in Court at all, had been expressly repealed?

II. The Consolidation Act respecting the preëxisting liabilities of the City of San Francisco and those of the County of San Francisco, contains only a declaration of good faith towards the public creditor, but makes no specific provision for his benefit, and the Board of Supervisors have no power to pay him.

Two existing corporations were to be amalgamated by the Consolidation Act, and two classes of persons were greatly interested in the consequences of this change. The first class was composed of the creditors of the two corporations, who inquired: "How are our claims to be paid?" To this the Legislature answers: "Provision shall be made from the revenues of the said City and County for the payment of the legal indebtedness of the former city corporation, and of the County of San Francisco." (Consolidation Act, sec. 4.)

The other class was composed of the corporators of the County of San Francisco, living outside of the former City of San Francisco, who inquire in their turn: "Are we, who never contracted \*these heavy city debts, to [690]

pay them?" To this the Legislature answers in the same section: "You shall never be taxed heavier than you were last year." These two quieting declarations, so natural and so just, are now made the ground of an attempt to impose an immediate duty on the Board of Supervisors to make provision for the payment of these judgments. That this proposition is untenable appears in various ways:

1. The declaration is in the future: "Provision shall be made," not "the legal indebtedness of the city and county shall be paid as hereinafter provided."

2. No machinery is given by which such payment could be made, and no one mode indicated of the many by which provision could be made for it. Provision made? How? By payment in cash? By funded bonds? By receipt for taxes? By exchange for lands? By competition under sealed proposals? How?

3. Section ninety-five of the Consolidation Act (Laws 1856, chap. 125, p. 172) expressly provides that "payments of demands on the treasury of said city and county, duly audited, may be made for the following objects, and none others;" and then follows the enumeration of fifteen objects for which such payments may be made, among which judgments against the city are not included.

Nay, more, by subdivisions 4, 5, 6, 7, 8, and 9 of that same section ninety-five, provision is made for the payment of the coupons and principal of the various then existing funded debts of the city and county, and by subdivision twelve for the payment of the then existing mortgage upon the City Hall. It seems, then, that neither the semi-annual interest upon the funded debts, nor the mortgage upon the City Hall could be paid out of the treasury, even after the declaration in section four, that provision should be made for their payment, without a further enumeration of each funded debt, and a specific provision for its payment. Why not? Because it was provided by the Consolidation Act that no payment could be made except "specifically authorized by this act." Laws 1856, chap. 125, p. 169, sec. 82, and by sec. 95, Laws 1856, p. 172 of the same act, no payments could be made except "for the following objects, and none others."

[691] \*4. Those having judgments or liabilities against

the former City of San Francisco, their counsel and the Legislature with its appropriate committees, have thought it necessary, from time to time, to apply for the passage of various acts to enable the Board of Supervisors to pay such judgments or liabilities. This is a universal, concurrent, contemporaneous exposition of great authority. Such acts were passed by the Legislature in the following instances: O'Donnell's judgment against "The City of San Francisco, (Laws 1858, 191;) Hayes' Claim, (Laws 1858, 325, 326;) Shattuck's Claim against the City of San Francisco, (Laws 1860, 28;) Hayes' Claim, (Laws 1860, 143;) Duane's Claim, (Laws 1860, 144;) Duane's Claim, (Laws 1861, 218.) Why pass these enabling acts if the treasury was already open for the payment of these claims?

5. "Provision was made from the revenues of the said city and county for the payment of this legal indebtedness of the former city corporation," as provided by the Consolidation Act, for that act took effect on July 1st, 1856. By Laws of 1858, chap. 225, p. 183, provision was made for these liabilities by the passage of "An Act to provide for the Funding and Payment of the Outstanding Unfunded Claims against the City of San Francisco, and against the County of San Francisco, as they existed prior to the first day of July, A. D. 1856." The same act was reenacted so as to extend the time for presentation to a certain portion of the same claims by chap. 528, p. 598, Laws 1861; and finally, further "provisions" were made for this very class of claims now in suit, by chap. 244, p. 265, Laws 1862. Would the Legislature have "authorized" the present corporation to compromise its liabilities by the issue of funded bonds redeemable *in futuro* if the creditors had a right to instant provision for their payment?

6. By the Consolidation Act (Laws 1856, chap. 125, p. 168, sec. 81, as amended by Laws 1857, chap. 224, p. 253, sec. 1) all lawful demands upon the treasury, except those payable out of the School Fund and the Surplus Fund, after having been duly audited, presented for payment, shall be received for taxes at one per cent. above their par value. Now these judgments, which by the defendants' return amount to \$1,500,000, are clearly not payable out of the School

Fund, nor out of the Surplus Fund. (Consolidation [692] \*Act, sec. 95, subd. 15.) Can it be supposed that the Legislature, by such a provision as this, authorized \$1,500,000 in judgment to be audited, thrown into the market, and received for the current taxes of a single fiscal year, at a rate above par—enough to swamp the revenues of three successive years, and to reduce the municipal government to absolute beggary?

Against this vast accumulation of cotemporaneous construction is to be placed only the recent discovery of the relator, that he had a relief already within his reach, and that by the Consolidation Act (subd. 19, sec. 74) the Board of Supervisors have power “to provide by regulation, where it may be necessary, for carrying the provisions of this act into complete effect.” But we are not pointed to any “provision of this act” which declares the duty of providing for the payment of these claims, while we do find that the legislative declaration of good faith has been carried out by other enactments, and the relator’s learned counsel pass over with great neglect section ninety-five of the Consolidation Act, which absolutely prohibits the payment of these judgments out of the treasury.

III. A *mandamus* will not issue against a public officer or corporation, except to compel the performance of a specific act clearly defined and enjoined by law, and which involves no discretion. (*The People ex rel. v. The Mayor, etc., of the City of New York*, 25 Wend. 680; Consolidation Act, secs. 68, 82, 84, 95; Statutes of 1857, 217.)

Even if it were conceded that this Court could make an order directing the Supervisors to make provision for the payment of the relator’s claim, this would be the extent of its power; it could not select the mode or prescribe the means by which provision should be made. To do so would be a clear invasion of the legislative authority delegated by the State to the corporation of the City and County of San Francisco. If it be the duty of the corporation to provide means for the payment of such claims as the present, that duty exists equally whether judgment has been obtained on them or not. Claims to twenty times the amount of the present may now exist against the corporation, for the payment of which it is



equally its duty to make provision. But how shall such provision be made? By what kind of tax? By what rate of taxation? \*What class of claims shall be [693] first provided for? Shall such tax be levied at the same time with the usual city and county taxes, or at some other time? Suppose a question arises as to the sufficiency of a certain rate of taxation to pay all the old existing indebtedness of the city, who is to determine the point? If all these details are subject to judicial control and direction, the Supervisors are *quoad hoc* mere puppets of legislators, exercising no discretion, possessing no choice between different plans of action, but speaking and acting simply as the Court directs. It is impossible to conceive a more complete subversion of the legislative function. And yet this is the course which the Court must pursue, if it directs the Supervisors to raise by taxation the amount necessary to pay the relator's claim. The moment it enters upon the complicated question of ways and means all general directions are insufficient, on account of the wide discretion they necessarily leave to the officers of the corporation. It was within the power of the Legislature utterly to abolish the old corporation, and deprive creditors of all remedy except an application for legislative relief. But the greater power implies the less. If they could deprive suitors of all remedy, they could compel them to accept payment of their debts in such manner as the Board of Supervisors might determine. A discretion is committed to them in deciding how provision shall be made from the revenues of the city, and the exercise of this discretion being a legislative act cannot be controlled by the Court.

It is in effect granting a high privilege to the creditor to declare that when he cannot collect his debt from a corporation, such corporation, acting in a legislative capacity, shall make provision for the payment of his debt. It is now asked that the Court shall go a step further, and usurping the legislative functions of the corporation, shall determine how such provision is to be made.

In *The People v. The Mayor, etc.*, 25 Wend. 685, the Court say: "The nature of the power (to make appropriations for the payment of debts, *i. e.*, to 'make provision' for their payment) necessarily implies the exercise of discretion, however

plain the duty may be; and where that exists in respect of the act complained of this remedy will not lie. If this corporation, like a State, were exempt from suits at law, [694] perhaps no remedy would \*exist in behalf of the relator except an appeal to their sense of justice." (See also *King v. Bristol Dock Co.*, 6 B. & C. 181.)

Supposing the Court were to direct the Supervisors to make provision for the payment of the relator's claim out of the fund in the treasury, how could this be done without an interference with the legislative functions of the corporation? May there not be equally meritorious claims existing in favor of other parties against this fund? As no money can be drawn from the treasury except by ordinance, such a direction would be equivalent to a command to every Supervisor to vote for the ordinance, and to the Mayor to approve it. (Consolidation Act, sec. 68; *The People v. Mayor, etc.*, 25 Wend. 685.) The relator would thus obtain a preference of payment out of this fund over all other creditors, though his claim might be no more meritorious than theirs.

The whole question is one of legislative discretion on the part of the Board of Supervisors. Assuming, as we must in this case, that there are moneys in the treasury sufficient to pay the judgment held by the relator, (since it is so charged in his affidavit, and is not denied,) what proceedings are necessary to get the money out of the treasury? An ordinance must be passed by the Board of Supervisors, presented to the Mayor for his approval; if disapproved, must be re-passed by the Supervisors by an increased vote. Now, the question is, can a Court compel the Supervisors to pass such ordinance and the Mayor to approve it? Most clearly not, without the most palpable judicial usurpation. An ordinance is voted on by ayes and noes, and the vote of each member is recorded. The right and duty of voting necessarily impiles a discretion as to how the vote shall be given, whether aye or no. Nor is it in the power of the Court to dictate how the vote is to be given. Yet in this case the effect of a decision for the relator would be to compel each Supervisor to vote for an ordinance to pay this judgment under penalty of imprisonment. Nor is this all: should a majority defeat the ordinance, the innocent minority must be punished with the guilty majority.

FIELD, C. J. delivered the opinion of the Court—COPE, J. and NORTON, J. concurring.

\*On the nineteenth of April, 1856, the Legislature [695] passed an act for the government of the City and County of San Francisco, commonly known as the "Consolidation Act." Its first section provides that the City of San Francisco shall continue a corporation by the name of the City and County of San Francisco, and possess the same rights and be subject to the same liabilities as before. Its second section vests in the city and county the public buildings, lands, and property, rights of action, money, revenue, and income belonging either to the City or to the County of San Francisco. Its fourth section enacts that provision shall be made from the revenues of the city and county for the payment of the legal indebtedness of the city, and also of the county; and that in case it shall become necessary, for the purpose of providing for the city indebtedness, to increase the taxation beyond a designated rate, the increased taxation shall be levied and assessed upon property situated within the limits of the city, as defined by the charter of 1855, and not upon property outside of those limits.

At the time, and long before the act in question was passed, the City of San Francisco was indebted to one Henry W. Seale in an amount exceeding \$58,000. To recover this amount, Seale instituted suit against the city, which was pending when the Consolidation Act took effect. In April, 1857, he recovered judgment in the Superior Court, and in July, 1860, on appeal to the Supreme Court, the judgment was affirmed. This judgment has never been paid, and on the twentieth of October, 1862, it was duly assigned to the relator, who has ever since been its holder and owner. Subsequently, on that day, the relator demanded of the Board of Supervisors of the City and County of San Francisco, in a regular and public session of the Board, to make provision for the indebtedness due on the judgment, in accordance with the requirements of the fourth section of the Consolidation Act. The Board neglected and refused to make any provision on the subject; and the present application is for a *mandamus* to compel that body to obey the law in this respect. At the

time of the demand there was in the treasury of the city and county, of the revenue of the fiscal year ending in June, 1862, a large amount of money, more than sufficient to pay the indebtedness upon the judgment, unspent and unappropriated.

[696] \*The application is resisted on various grounds, several of which are unsupported by the facts of the case; and to them we shall not give any consideration. We shall only notice those which go to the merits of the proceeding. The latter are substantially as follows: *First*—That the existing corporation, “the City and County of San Francisco,” is not identical with the former “City of San Francisco;” and the judgment rendered against the city is not therefore binding upon the city and county. *Second*—That the provision of the fourth section of the Consolidation Act, respecting the preëxisting indebtedness of the City of San Francisco, is a mere declaration of good faith towards the public creditors, and not a requirement imposing any duties upon the Supervisors; and, *Third*—That *mandamus* is not the appropriate remedy to enforce the claim of the relator.

1. The first position is answered by the language of the act, which is clear and unmistakable. The corporation—the City of San Francisco—is not destroyed, but continued. Its name only is changed, and the change in this respect did not require any alteration of the pleadings, nor any suggestion upon the record. If, pending a suit against an individual, the Legislature should change his name, the fact would not abate the suit, nor call for any special action on the part of the adverse party, or of the Court. Where any change is suggested, the vital question is not one of names, but of persons—is the same individual, whether natural or artificial, in existence? If this can be answered in the affirmative, the case is not abated, but proceeds to its final disposition.

2. The provision of the fourth section is not a mere legislative declaration of good faith toward the public creditors. It is not a mere pledge that, at some future period, provision shall be made by the Legislature for the payment of the previous indebtedness of the city. The language is that of command from a superior to an inferior body. The act de-

clares that the liabilities of the city shall survive and continue; it vests all the public property, revenue, and moneys of the city in the city and county; it places the government of the city and county in the hands of the Supervisors; and it declares that provision *shall* be made for the payment of the debts of the city, and designates the source from which the pay-<sup>\*</sup>ment shall be made—"from the rev- [697] enues" of the city and county. It even looks to the possibility of taxation above a designated rate, and directs the mode in which, in that event, the increased taxation shall be levied. It is impossible, without a violation of the most obvious rules of construction, to view the clause in question in any other light than as a command to be obeyed, and not as a promise to be subsequently carried out by future legislation.

The construction for which the respondents contend would convict the Legislature of intending to do manifest injustice. Their theory is that the Legislature has taken from the original corporation all its rights and property, and vested them in a new and different corporation, and thus deprived the creditors of all means of enforcing payment of their debts, and in return has simply given them the assurance that some future Legislature, the action of which it could not control, would provide for their case and render them justice. It would require very clear language to induce the Court to attribute any such purpose to the Legislature. A provision adopted with that view would hardly be characterized as a "declaration of good faith." We do not think that the Legislature designed any such purpose. We do not think that it ever intended by the act in question to postpone indefinitely the payment of the existing liabilities of the city, and to mock the creditors with a promise that they should ultimately be provided for by some uncertain action of some future representatives of the people.

3. *Mandamus* is the appropriate remedy to enforce obedience on the part of the Supervisors to the legislative command. In issuing it the Court does not assume the province of controlling their discretion, where that exists. But here the Supervisors have no discretion, except between two courses of procedure. They must provide for the payment of the just debt of the relator, established by the highest record evi-

dence known to the law. They must appropriate the money from the revenues of the city and county already in treasury, or they must raise the money by taxation. The authority is ample, and their duty plain. And it would seem that no direction from a Court ought to be considered necessary to induce the performance of so manifest a duty.

[698] with reference to \*the just obligations of the City of San Francisco. The delay in doing justice has already swelled the amount of the relator's claim from fifty-eight over one hundred thousand dollars, independent of the necessary expenses incurred by the city and county in attempting to avoid liability. That liability having been determined, no reasonable excuse can be offered for further delay on the part of the Supervisors in making the provision directed by the statute.

The ninety-fifth section of the Consolidation Act does not apply to judgments recovered upon the preëxisting indebtedness of the city. Such judgments can acquire no additional validity by being audited, nor is provision the less to be made for their payment because of the restrictions of this section and of other clauses of the act. However broad the terms of the section in question, or of other clauses, they must be read in connection with the fourth section, and receive such a construction that the provisions of all may stand side by side and right and justice be done.

It is of no consequence that the mode in which the provision shall be made—the machinery for effecting the payment—is not specially pointed out by the act. The legislative command is to make provision for the payment from certain sources. The duty carries with it the means. In imposing the duty upon the Supervisors, the Legislature authorized them, without further designation, to take all ordinary measures essential to its complete performance. They can appropriate from the revenues; they can levy a tax, and the adjusting of the details is a mere matter of administration which can be had under the direction of any of the officers of the corporation specially designated for that purpose. (*Commonwealth v. Commissioners of Alleghany County*, 8 Casey, Penn. 218; *Commonwealth v. Pittsburg*, 10 Id. 4; *Maddox v. Graham et al.*, 2 Metcalf, Ky. 57.)

It follows that the judgment of the Court below must be reversed, and that Court directed to issue a peremptory *mandamus* in accordance with the prayer of the petition of the relator; and it is so ordered

\*The respondents filed a petition for rehearing, [699] upon which COPE, C. J.\* delivered the opinion of the Court—NORTON, J. concurring.

The petition for a rehearing in this case must be denied. The point suggested in it was fully considered when the case was decided. The provisions of the Consolidation Act in regard to the payment of the indebtedness of the city are mandatory and imperative, and the Supervisors have no discretion upon the subject. It is provided, in the first place, that the indebtedness of the city shall continue against the city and county, and in the second place that provision shall be made from the revenues for its payment. There is a general provision giving to the Supervisors the power to provide by regulation for carrying the act into complete effect. The idea that further legislation is contemplated has no foundation to rest on. The act declares in plain words that "provision shall be made," and the power to make it is conferred upon the Supervisors, and not reserved to the Legislature. The language is unambiguous, and the intention clear, and the duty enjoined is one which the Supervisors have no right to disregard, and cannot refuse to perform. They are the creatures of the act, and whatever the act requires of them they are bound to do; their duty is simply that of obedience. They must do what the act enjoins, and refrain from doing that which it prohibits, and their duty is no plainer or more imperative in the one case than in the other. The fact that the duty required of them involves the passage of an ordinance makes no difference; the duty itself is no less incumbent upon them because they must perform it in a particular way. It certainly cannot be that a duty positively enjoined may become a matter of discretion by reason of the character of the proceedings necessary to its proper discharge. There is a suggestion to that effect in the case of *Lynch v. The Mayor, etc.*,

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\* See note to page 667.



of the City of New York, 25 Wend. 680, but it is entirely unsupported by either principle or authority. The case was an application for a *mandamus* to compel the payment of the plaintiff's salary as a Judge, and the decision was put mainly upon the ground that the plaintiff had an adequate remedy by action. In a subsequent case between the same parties, the application was denied on that ground exclusively, the power of the Court to issue the writ and compel obedience to it being expressly affirmed. (2 Hill, 45.) It is true the Legislature had interposed, and directed the auditing and allowance of the salary, but the duty thus enjoined was regarded in the former case as existing under the law as it then stood. On the point in question, therefore, the latter case is an overruling authority, and there is, in our opinion, no doubt of its correctness. The present case differs from it in the fact that the application is based upon a judgment, and nothing remains but the duty of payment. This duty is cast upon the Supervisors, and the mode of discharging it clearly pointed out, and whatever is required for that purpose they must do. If an ordinance is required, they must pass it, and it is no answer to say that the passage of an ordinance is a legislative act implying discretion. There being no discretion as to the duty to be performed, there can be none as to the use of the means required in performing it. It is said that in passing an ordinance the assent of a majority of the Supervisors is necessary, and that there is no power in the Courts to compel them to give it. They act in such cases by vote, and the argument is that the right to vote includes the right to vote either for or against, according to the will of the voter. This argument, as applied to the case of an imperative duty, is manifestly erroneous, and we see nothing in it which is not met by what has already been said on the subject of discretion. In the absence of discretion as to the thing to be done, the Supervisors have no volition except to do it, and to assert the contrary is to assert that their will is superior to the law. We cannot dictate the action to be taken, but we can compel them to act, and their duty is too plain to be misconceived. It consists simply in making provision for the payment of the debt, in accordance with the mandate of the Legislature. The revenues are designated as the source



of payment, and they must either appropriate the amount from moneys in the treasury, or levy a tax to obtain it.

In support of these views, and in further elucidation of the subject generally, we propose to examine a few authorities. In the case of *Thomas v. The Commissioners of Alleghany County*, 32 \*Penn. 218, a *mandamus* was issued to compel the Commissioners to make provision for the payment of the interest on certain bonds of the county. [701] The bonds were given in pursuance of an Act of the Legislature authorizing the county to subscribe to the capital stock of the Pittsburg and Steubenville Railroad Company, and to borrow money to pay the amount of such subscription. The Commissioners were empowered to make provision for the principal and interest of the money so borrowed, as in other cases of loans to the county; and the Court held that the existence of the power created a corresponding duty which the Commissioners were bound to perform. The case of *Hamilton v. The Select and Common Councils of the City of Pittsburg*, 34 Penn. 496, establishes the same principle, and the question of the remedy by *mandamus* is discussed in the opinion of the Court with much ability. The writ was asked to compel the two Councils to make provision, by the assessment and collection of a tax, for the payment of the interest due on money borrowed by the city to pay a subscription to the stock of the Chartiers Valley Railroad Company. The act under which the money was borrowed vested in the city the power to make provision for the payment of the principal and interest by the assessment and collection of a tax, and a different act gave to the Select and Common Councils a general power to assess and collect taxes for the use of the city. It was objected on the argument that neither of these acts imposed a duty upon the Councils to assess and collect the tax, but the Court overruled the objection, and said: "It is absurd to argue that conferring such a power is imposing no duty. The Select and Common Councils are public agents, created to perform a public trust. One of the purposes of their creation is, that they may provide for the payment of the debts of the city. It is true the Act of 1853 only declares that the city shall have power to make provision for the payment of the principal and interest of the money borrowed,

by the assessment and collection of a tax; but in a statute the word *may* means *must* or *shall*, in cases where the public interest or rights are concerned, and where the public or third persons have a claim *de jure* that the power shall be exercised. The duty of the city is therefore imperative to assess and collect the tax, and the power and corresponding duty are, by [702] \*one of the acts referred to, devolved upon the Select and Common Councils." In *Maddox v. Graham & Knox*, 2 Met. Ky. 56, the Common Council of the City of Marysville had been authorized and required to levy and collect a tax for a particular purpose, and it was held that *mandamus* was the proper remedy to compel performance of that duty. The Court, after stating the facts and citing a number of authorities, said: "We have had occasion to observe that the supreme law-making power of the State has given power to and imposed an obligation on the City Council to do a particular act, and that no specific remedy had been provided for non-performance. Certainly, according to the authorities cited, the Court will, in order to prevent a failure of justice, grant the writ to command the doing of the act enjoined by the statute." In *Carroll v. The Board of Police*, 28 Miss. 38, a *mandamus* was awarded requiring the defendants to raise by taxation an amount sufficient for the payment of a claim which they had previously audited and allowed. On the question of remedy the Court said: "It has been argued on behalf of the defendants, that the relator had a full and complete remedy, either by bill in equity or by an action at law. This argument has already been incidentally met in considering other points made in the defense. The manner in which and the tribunal before which a claim against a county must be enforced are clearly defined by the statute. This tribunal has long since acted in regard to the claims now in controversy. They have been as definitely ascertained, and judgment directing their payment as clearly pronounced, as it is possible for any other Court, even if it had jurisdiction, to pronounce a judgment in the premises. There is no unsettled or open question as to the amount to be paid, but only whether the sum already adjudged shall be paid as directed by the order of the Board of Police. The question is, by what means shall this judgment be enforced? It has already

been said that the Board of Police by their judgment tacitly agreed to provide the means, in the mode pointed out by law, with which to pay the warrants directed to be issued on the treasury of the county. Indeed, such was the nature and operation of the judgment itself. If a suit could be maintained at all at law, it would be against the members of the Board as individuals for failing to discharge their \*duty as public officers in levying the tax required by [703] law to pay the debt of the county. This might be, to say the most, a very inadequate remedy to the creditor. He, in making his contract, trusted to the ability of the county to meet the engagement, and not to the individual responsibility of the members of the Board of Police. The county, by the contract, became his debtor, and it is to the party trusted that he has a right to look for payment. The Board of Police, as the public agents of the county, and as the officers of the law, undertook to do what was necessary and required of them by law. to compel the county to execute the contract. As public officers they have failed in discharging their duty in this respect. As public officers their action is still necessary to enable the creditor to get his rights, as adjudged and settled by the Board of Police, and the question is, whether there is any other remedy than that by *mandamus* which can accomplish this object. If there be any other, counsel have failed to point it out, and it is certainly unknown to the jurisprudence of this State. There is, therefore, no doubt as to the remedy."

These cases are but examples of what has been said and done by the Courts generally on this subject, and there is no ground upon which the case at bar can be distinguished from them in respect to the remedy sought. In all of them, and in many more which might be cited, the writ was directed to municipal bodies similar in their organization to the Board of Supervisors, and it has never been doubted that such bodies were subject to the control of the Courts in respect to the duties enjoined upon them by law. The rule to be collected from the cases is, that where a statute gives power to or imposes an obligation on a particular person or body, to do a particular act or duty, and provides no specific legal remedy in case of nonperformance, the Court will, in order to prevent

a failure of justice, grant the writ to command the doing of such act or duty. It is obvious that the case before us falls within this rule, for the statute not only gives the power, but expressly imposes the obligation, and the plaintiff has no other remedy, either under the statute or independent of it, by which he can obtain the benefit intended to be secured to him. The debt belongs to the class referred to in the statute, and the duty of providing for its payment is devolved

[704] \*upon the Supervisors, and the plaintiff has a right to demand that this duty shall be performed; the only and consequently the proper remedy to compel it being that by *mandamus*. We regard the case as a very plain one, and are entirely satisfied with the conclusion previously arrived at.

The petition is denied,

**ARTICLE SIX**  
**OF THE**  
**CONSTITUTION OF CALIFORNIA,**  
***AS AMENDED IN 1862.***

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**SECTION 1.** The judicial power of this State shall be vested in a Supreme Court, in District Courts, in County Courts, in Probate Courts, and in Justices of the Peace, and in such Recorders' and other inferior Courts as the Legislature may establish in any incorporated city or town.

**SEC. 2.** The Supreme Court shall consist of a Chief Justice and four Associate Justices. The presence of three Justices shall be necessary for the transaction of business, excepting such business as may be done at Chambers, and the concurrence of three Justices shall be necessary to pronounce a judgment.

**SEC. 3.** The Justices of the Supreme Court shall be elected by the qualified electors of the State at special elections to be provided by law, at which elections no officer other than judicial shall be elected, except a Superintendent of Public Instruction. The first election for Justices of the Supreme Court shall be held in the year eighteen hundred and sixty-three. The Justices shall hold their offices for the term of ten years from the first day of January next after their election, except those elected at the first election, who, at their first meeting, shall so classify themselves by lot that one Justice shall go out of office every two years. The Justice having the shortest term to serve shall be the Chief Justice.

SEC. 4. The Supreme Court shall have appellate jurisdiction in all cases in equity, also in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars; also in all cases arising in the Probate Courts; and also in all criminal cases amounting to felony, on questions of law alone. The Court shall also have power to issue writs of *mandamus*, *certiorari*, prohibition, and *habeas corpus*, and also all writs necessary or proper to the complete exercise of its appellate jurisdiction. Each of the Justices shall have power to issue writs of *habeas corpus* to any part of the State, upon petition on behalf of any person held in actual custody, and may make such writs returnable before himself or the Supreme Court, or before any District Court, or any County Court in the State, or before any Judge of said Courts.

SEC. 5. The State shall be divided by the Legislature of eighteen hundred and sixty-three into fourteen Judicial Districts, subject to such alteration from time to time, by a two-thirds vote of all the members elected to both Houses, as the public good may require; in each of which there shall be a District Court, and for each of which a District Judge shall be elected by the qualified electors of the district at the special judicial elections to be held as provided for the election of Justices of the Supreme Court by section three of this article. The District Judges shall hold their offices for the term of six years from the first day of January next after their election. The Legislature shall have no power to grant leave of absence to a judicial officer, and any such officer who shall absent himself from the State for upwards of thirty consecutive days shall be deemed to have forfeited his office.

SEC. 6. The District Courts shall have original jurisdiction in all cases in equity; also in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars; and also in all criminal cases not otherwise provided for. The District Courts and their Judges shall have power to issue writs of *habeas corpus* on petition by or on behalf of any person held in actual custody in their respective districts.

SEC. 7. There shall be in each of the organized counties of the State a County Court, for each of which a County Judge shall

be elected by the qualified electors of the county, at the special judicial elections to be held, as provided for the election of Justices of the Supreme Court by section three of this article. The County Judges shall hold their offices for the term of four years from the first day of January next after their election. Said Courts shall also have power to issue naturalization papers. In the City and County of San Francisco the Legislature may separate the office of Probate Judge from that of County Judge, and may provide for the election of a Probate Judge, who shall hold his office for the term of four years.

SEC. 8. The County Courts shall have original jurisdiction of actions of forcible entry and detainer, of proceedings in insolvency, of actions to prevent or abate a nuisance, and of all such special cases and proceedings as are not otherwise provided for; and also such criminal jurisdiction as the Legislature may prescribe; they shall also have appellate jurisdiction in all cases arising in Courts held by Justices of the Peace and Recorders, and in such inferior Courts as may be established, in pursuance of section one of this article, in their respective counties. The County Judges shall also hold, in their several counties, Probate Courts, and perform such duties as Probate Judges as may be prescribed by law. The County Courts and their Judges shall also have power to issue writs of *habeas corpus*, on petition by or on behalf of any person in actual custody in their respective counties.

SEC. 9. The Legislature shall determine the number of Justices of the Peace to be elected in each city and township of the State, and fix by law their powers, duties, and responsibilities: *provided*, such powers shall not, in any case, trench upon the jurisdiction of the several Courts of Record. The Supreme Court, the District Courts, County Courts, the Probate Courts, and such other Courts as the Legislature shall prescribe, shall be Courts of Record.

SEC. 10. The Legislature shall fix by law the jurisdiction of any Recorder's or other inferior Municipal Court which may be established in pursuance of section one of this article, and shall fix by law the powers, duties, and responsibilities of the Judges thereof.

SEC. 11. The Legislature shall provide for the election of a Clerk of the Supreme Court, County Clerks, District Attorneys, Sheriffs, and other necessary officers, and shall fix by law their duties and compensation; County Clerks shall be *ex officio* clerks of the Courts of Record in and for their respective counties.

The Legislature may also provide for the appointment by the several District Courts of one or more Commissioners in the several counties of their respective districts, with authority to perform Chamber business of the Judges of the District Courts and County Courts, and also to take depositions, and to perform such other business connected with the administration of justice as may be prescribed by law.

SEC. 12. The times and places of holding the terms of the several Courts of Record shall be provided for by law.

SEC. 13. No judicial officer, except Justices of the Peace, Recorders, and Commissioners, shall receive to his own use any fees or perquisites of office.

SEC. 14. The Legislature shall provide for the speedy publication of such opinions of the Supreme Court as it may deem expedient; and all opinions shall be free for publication by any person.

SEC. 15. The Justices of the Supreme Court, District Judges, and County Judges shall severally, at stated times during their continuance in office, receive for their services a compensation, which shall not be increased or diminished during the term for which they shall have been elected; *provided*, that County Judges shall be paid out of the County Treasury of their respective counties.

SEC. 16. The Justices of the Supreme Court, and the District Judges, and the County Judges shall be ineligible to any other office than a judicial office during the term for which they shall have been elected.

SEC. 17. Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law.

SEC. 18. The style of all process shall be "The People of the State of California," and all prosecutions shall be conducted in their name and by their authority.

SEC. 19. In order that no inconvenience may result to the public service from the taking effect of the amendments proposed to said article six by the Legislature of eighteen hundred and sixty-one, no officer shall be superseded thereby, nor shall the organization of the several Courts be changed thereby, until the election and qualification of the several officers provided for in said amendments.



# INDEX



# INDEX.

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## ABANDONMENT.

1. **ABANDONMENT NOT SHOWN BY FAILURE TO PAY TAXES.**—The payment of taxes by the grantee in a tax deed upon the property for a portion of the time he is in possession, claiming title under the deed, is not by itself, disconnected from other circumstances, evidence that the owner has abandoned the property. *Keane v. Gannon*, 291.
2. **ABANDONMENT INFERRED FROM LAPSE OF TITLE.**—An abandonment may in some cases be inferred from the lapse of time and the delay of the first occupant in asserting his claim to the possession against parties subsequently entering upon the premises, but in such cases the leaving of the premises must have been voluntary, and without any expressed intention to resume the possession. *Id.*
3. **AGENCY TO REBUT PRESUMPTION OF ABANDONMENT.**—The fact that a party, when ceasing to occupy premises, left an agent in charge of them, is of itself sufficient to rebut the presumption of abandonment arising from the cessation of his occupancy, and to render the question of abandonment one of intention proper for determination by a jury from the circumstances. *Id.*

## ACCORD AND SATISFACTION.

1. **ACCORD AND SATISFACTION.**—Accord and satisfaction, as a defense to an action for the recovery of money, must be specially pleaded. *Coles v. Souleby*, 47.

See CREDITOR AND DEBTOR, 1; APPEAL, 6.

## ACTION.

1. **DISMISSAL OF ACTION, EFFECT OF.**—A dismissal of an action is in effect a final judgment in favor of the defendant. It is a final decision of that action as against all claims made by it, although it may not be a final determination of the rights of the parties as they may be presented in some other action. *Leese v. Sherwood*, 151.
2. **IDEM—A FINAL DETERMINATION.**—On a sale of land by L. and wife to S. a portion of the purchase money was paid, and a balance of \$14,000 was by the terms of the deed to be paid when an action then pending by one Rico against the vendors, to recover a portion of the property, should be "finally decided" in favor of the defendants therein (plaintiffs here) "as against all claims made by said Rico." By a contemporaneous agreement it was stipulated that a dismissal of the action of Rico should not be considered a final decision, provided a new suit for the same subject matter should be commenced by Rico on or before the eleventh day of

April next succeeding the date of the agreement. The action of Rico was, on motion of the defendants therein dismissed, after the eleventh day of April, and thereupon L. and wife brought suit for the \$14,000: *Held*, that as the express stipulation about a dismissal evidently had reference to one procured before the eleventh day of April, a dismissal after that day was not affected by the stipulation, but was to have such force as should result from the other terms of the agreement; that under those terms a dismissal at any time was a final determination of the action, and that plaintiffs were entitled to recover. *Id.*

3. ACTION TO QUIET TITLE CANNOT BE MAINTAINED AGAINST TENANT.—An action cannot be maintained under the two hundred and fifty-fourth section of the Practice Act, by a landlord against his tenant in possession for the purpose of determining the validity of an adverse title set up by the tenant. *Van Winkle v. Hinkle*, 342.
4. ACTION AGAINST WHOM IT LIES.—The section of the statute above referred to must be construed as giving a remedy only against parties who are in a position to assert their rights, and not against those who are barred by a temporary estoppel as to the right asserted on the other side. *Id.*
5. QUIETING TITLE—POSSESSION OF PLAINTIFF ESSENTIAL.—To maintain an action to quiet title, under the two hundred and fifty-fourth section of the Civil Practice Act, it is essential that the plaintiff have possession of the premises when the action is commenced. *Rico v. Spence*, 504.

See LIMITATIONS, STATUTE OF, 6, 7; MORTGAGE, 1; EQUITY, 10-12; ARBITRATION.

#### ADMINISTRATOR AND EXECUTOR.

1. EXECUTOR'S DEED AS EVIDENCE OF SALE.—An executor's deed is not admissible in evidence of a sale of a testator's property, except upon preliminary proof of a compliance with the statutory provisions for sales by executors and administrators, or of an express power in the will authorizing the sale in the mode in which it appears by the deed to have been made. *White v. Moses*, 43.
2. EJECTMENT—DEED OF EXECUTOR AS EVIDENCE OF TITLE.—In an action of ejectment by the executors of W. to recover from M. certain real estate devised by the testator, the defendant, for the purpose of showing an outstanding title, offered in evidence a deed of the property made by the executors to a third person, which deed recited that the executors were authorized by the will "to sell his (the testator's) property as therein mentioned and contained." No order of the Probate Court for the sale of the property was shown, but the admissibility of the deed was rested upon its own recitals with proof of its execution: *Held*, that it was inadmissible; that from the recital alone, without the production of the will, it could not be concluded that the power to sell was given absolutely by the will; and that in the absence of proof of such a power in the will, the validity of the sale could only be established by proof of a compliance with the forms prescribed by statute for the sale of property by executors. *Id.*
3. SUGGESTION OF DEATH AND SUBSTITUTION OF EXECUTOR.—Where the plaintiff in an action died before trial, and a subsequent order for judgment contained a recital as follows, "This action having been continued in consequence of the death of the plaintiff, by his executor, Samuel Webb, and the jury having found a verdict for plaintiff," and then awarded judgment in favor of the plaintiff: *Held*, that the recital sufficiently showed a suggestion of the death of the original plaintiff and a continuance or revival of the cause in the name of the executor. *Gregory v. Haynes*, 443.

4. CONTINUANCE OF NAME OF DECEASED DOES NOT AVOID THE JUDGMENT.—The continuance of the name of a deceased plaintiff instead of that of his executor, in a judgment rendered after the substitution, is an error of form only, and does not make the judgment void. *Id.*

See HUSBAND AND WIFE, 3, 4; MORTGAGE, 1, 5; TENANT IN COMMON, 1; PARTNERSHIP, 1, 2.

### AGENT.

1. NOTE SIGNED BY AGENT, LIABILITY ON.—An agent signing his own name to a promissory note made on behalf of his principal is not personally liable as a maker if the instrument itself discloses the intention to bind his principal and not himself. *Shaver v. Ocean Mining Co.*, 45.
2. *IDEM*—PRESUMPTIONS.—James Harter and S. N. Stranahan were sued as joint makers with the Ocean Mining Company of a note, set forth in the complaint, in the following form: "Three months after date, the Ocean Mining Company promise to pay to W. G. Bright or order one thousand dollars, for value received, with interest at the rate of two per cent. per month. (Signed) James Harter, Trustee, S. N. Stranahan." Judgment by default was rendered against the company and H. and S.: *Held*, that this judgment was erroneous; that the instrument itself showed the intention of H. and S. to bind the company and not themselves, and that they were not personally liable. *Id.*

See FRAUD AND STATUTE OF FRAUDS, 3, 6, 8; DEED, 6-9; SALE, JUDICIAL, 7.

### AGREEMENT.

See CONTRACT.

### ALCALDE GRANT.

See SAN FRANCISCO, 1-3, 5.

### ALIENATION.

See MEXICAN GRANT, 4.

### APPEAL.

1. FINDINGS OF REFEREE—PRESUMPTIONS.—Where the record on appeal contains a report of a referee by whom the case was tried below, in which is a finding of the facts by him, and no statement on motion for new trial appears in the transcript, it will be presumed that the findings of the referee were based upon sufficient evidence. *Donahue v. Cromartie*, 80.
2. FUNDS IN HANDS OF RECEIVER—ORDER FOR DISTRIBUTION NOT APPEALABLE.—An order directing the receiver in an action to "distribute of the funds in his hands, under and in the order mentioned in the decree heretofore made in this cause, the sum of \$5,000 to the parties entitled to the same," is not an appealable order. *Adams v. Woods*, 165.
3. *IDEM*.—Such an order is not a special proceeding, within the purview of the first subdivision of section three hundred and thirty-six of the Practice Act, nor can it, when detached from the proceedings in an action, be treated as a final judgment from which an appeal may be taken. *Id.*

4. **IDEM.**—If an order for the distribution of a sum of money by a receiver may in some cases be a final judgment, an appeal from it must present it as the final result of some proceeding, and the record must show what the proceeding is. *Id.*
5. **FINDING NOT DISTURBED WHERE EVIDENCE CONFLICTS.**—A finding of fact by the lower Court will not be disturbed by the appellate Court when the evidence is conflicting, or where the conclusion drawn from it is not necessarily erroneous in point of law. *Lewis v. Covillaud*, 178.
6. **ACCORD AND SATISFACTION.**—Thus, where C. purchased a city lot of B., and as part of the consideration assumed the payment of a note from B. to L., secured by mortgage upon the property, and some time afterwards C. and L. entered into an arrangement by which C. executed his notes to L. for about three-fourths of the amount due on the original note, and to secure these latter notes gave a new mortgage upon the property, and L. thereupon delivered up the old mortgage, but not the note, and indorsed upon the record entry of the mortgage, "Satisfied by being released." *Held*, that whether this was an accord and satisfaction of the whole debt, depended upon the intention of the parties, and that the Court below having, upon conflicting evidences in this respect, found as a fact that full satisfaction was not intended, its finding would not be disturbed, although the appellate Court might be of opinion that the weight of evidence was against the finding. *Id.*
7. **RENTS AND PROFITS PENDING APPEAL.**—Where an appeal is taken from a decree foreclosing a mortgage by the mortgagor who is in possession of the premises, the statute does not require an undertaking on appeal, binding the appellant to account to the plaintiff for the rents, or the value of the use and occupation of the premises, pending the appeal. *Whitney v. Allen*, 233.
8. **IDEM.—INTENTION OF STATUTE.**—The provision in section three hundred and fifty-two of the Practice Act in regard to use and occupation refers to cases in which the creditor is entitled to the use, and more particularly to judgments and orders directing a delivery of possession. It was not intended by this section either to increase the liability of the debtor or to subject the sureties to a liability greater than that of the principal. *Id.*
9. **ERROR AFFECTING RIGHTS OF PARTIES NOT APPELLANTS.**—A judgment will not be reversed because of an error which affects the rights of parties who have not appealed, and not those of the appellants. *Speyer v. Ihmels*, 280.
10. **NEW TRIAL ON INTERVENTION.**—Where the merits of the case were not investigated in the lower Court by reason of an uncertainty as to the proper mode of proceeding under the anomalous provisions of the Practice Act relating to interventions, the Supreme Court awarded a new trial, although the decision of the Court below upon the main question involved was approved, and the only error disclosed might have been cured by a direction to modify the judgment. *Id.*
11. **VERDICT AGAINST WEIGHT OF EVIDENCE.**—A verdict of guilty will not be set aside by the Appellate Court on the ground that it is against the weight of conflicting evidence. There must, to authorize an interference by this Court, be such overwhelming evidence against the verdict as to justify the inference that it was rendered under the influence of passion or prejudice, or bias of some kind. *People v. Vance*, 400.
12. **ORDER AWARDING A NEW TRIAL IN DISCRETION.**—Where on appeal from an order granting a new trial the record shows that the motion was made upon several grounds without showing upon which of them the action of the Court below was based, the order will not be reversed if it was within the discretion of the Court to make it upon any of the grounds stated. *Oullahan v. Starbuck*, 413.

13. **IDEM.**—The action of the District Court in granting a new trial on the ground of alleged insufficiency of the evidence, will not be interfered with when the evidence is conflicting, although the Appellate Court may differ in opinion with the lower Court as to the weight of the evidence. *Id.*
14. **ORDER STAYING PROCEEDINGS NOT APPEALABLE.**—An order made in an action pending in the District Court staying all proceedings therein until the further direction of the Court, is not an appealable order. The remedy of a party prejudiced thereby is by application for a *mandamus* to compel the Court to proceed. *Rhodes v. Craig*, 419.
15. **DECISION OF SUPREME COURT—LAW OF THE LEASE.**—Although a previous ruling of the Appellate Court upon a point directly made is, as to all subsequent proceedings, a final adjudication, yet when the ruling relates to a matter of fact it can only be invoked where the fact reappears under the same circumstances in which it was originally presented. *Nieto v. Carpenter*, 455.
16. **IDEM.—WHEN SUPREME COURT NOT BOUND BY ITS DECISION.**—Thus where, on a previous appeal, a document in the Spanish language was construed and its legal effect declared, the decision being based upon an erroneous translation of the instrument, and on a second appeal a different and correct translation was presented: *Held*, that the Appellate Court was not bound by the former decision, so far as it was induced by the inaccuracy of the translation. *Id.*
17. **RULINGS OF SUPREME COURT—LAW OF THE CASE.**—Where the Supreme Court, in reversing a judgment and remanding the cause for a new trial, consider and pass upon a point of law, with a view to the new trial for the purposes of which it is important, the ruling upon such point, though not essential to the decision, becomes the law of the case in all its future stages. *Table Mountain Tunnel Company v. Stranahan*, 548.
18. **IDEM.**—Thus, on an appeal from a judgment in favor of defendant in an action to recover a mining claim, the cause was remanded for a new trial on the ground that certain evidence of location offered by the plaintiff had been erroneously excluded and certain mining laws improperly admitted. In an opinion giving its reasons for the decision, the Court discussed the effect of a location in the absence of mining laws, and declared certain principles of law applicable to such locations. On the new trial the lower Court was asked by defendant to give, as an instruction to the jury, a portion of the opinion embracing the declaration of legal principles above referred to, which it refused to do: *Held*, on a second appeal that the rules of law thus declared in the former opinion, whether intrinsically correct or not, were the law of the case, and that it was therefore error to refuse the instruction. *Id.*

See UNDERTAKING, 5, 6; CERTIORARI; PARTITION; LANDLORD AND TENANT, 13; PRACTICE, 29.

## APPROPRIATION.

See WATER RIGHT, 1, 3; EVIDENCE, 6.

## ARBITRATION.

1. **OBJECTIONS TO AWARD—WHAT MUST BE SHOWN.**—Where an award is objected to on the ground that it embraces matters not in fact submitted, though within the general terms of the submission, it lies with the objecting party to show affirmatively in what the arbitrators have exceeded their authority. Without such showing the award will be sustained. *Blair v. Wallace*, 317.

2. **IDEM.**—Thus, where the agreement of submission recited a sale and resale of certain lands, out of which transaction disputes and misunderstandings had arisen, and the submission was of "all and every matter of dispute arising from or growing out of the transaction, aforesaid," an award that one party receive from the other a certain amount of money and convey to him the lands mentioned, is *prima facie* authorized by the submission. *Id.*
3. **WHO MAY SUBMIT TO ARBITRATION.**—Wherever parties may by their own act transfer real property, or exercise any act of ownership with regard to it, they may refer any disputes concerning it to the decision of arbitrators, who may order the same acts to be done which the parties themselves might do by agreement. This was the rule at common law and is not altered by section three hundred and eighty of the Practice Act. *Id.*

#### ASSIGNOR AND ASSIGNEE.

See **LIMITATIONS, STATUTE OF, 11; PROMISSORY NOTE, 4; PAYMENT, 1; MORTGAGE, 7, 8, 23; PARTIES, 3; CONTRACT, 7; MEXICAN GRANT, 1.**

#### ATTACHMENT.

See **PRACTICE, 4, 16, 17; PLEADING, 13.**

#### ATTORNEY.

1. **ATTORNEY-AT-LAW—AUTHORITY TO APPEAR.**—The authority of an attorney-at-law to appear for parties for whom he enters an appearance in an action will be presumed where nothing to the contrary appears. *Hays v. Shattuck, 51.*

#### BILL OF EXCHANGE

See **PROMISSORY NOTE; PAYMENT, 2.**

#### BOARD OF SUPERVISORS.

See **FRANCHISE, 2, 3; MUNICIPAL CORPORATION, 3, 4.**

#### BOND.

1. **JOINT BOND WHEN INVALID.**—A bond, which in form is the joint obligation of a principal and his sureties, and not joint and several, and signed by the sureties but not by the principal, is invalid and not binding upon the sureties. *People v. Hartley, 585*
2. **SIGNATURE OF PRINCIPAL.**—The absence of the signature of the principal obligor to an official bond is not a defect which may be cured by its suggestion in a complaint under the eleventh section of the Act concerning Official Bonds. *Id.*

See **UNDERTAKING.**

#### BRIDGES AND FERRIES.

1. **BRIDGES AND FERRY FRANCHISES.**—The provisions of the Acts of 1850 and 1855, concerning bridges and ferries, prohibiting the subordinate granting tribunals from licensing a second bridge or ferry within one mile of a former one, except under certain conditions, one of which is where a second grant is required by the public convenience, impose no restrictions upon the power of the Legislature in making other grants. *Fall v. County of Sutter, 237.*



## INDEX.

2. **IDEM—TOLL-BRIDGES.**—Under the Act of 1850 concerning public ferries, the plaintiffs, in 1852, obtained from the Court of Sessions of Yuba County, a license to construct and maintain a toll-bridge across the Feather River, at a point near the city of Marysville, and constructed and have since maintained, at the point indicated, a bridge sufficient to accommodate the line of travel, and have complied with all the provisions of the law regulating franchises of this character. In 1859 the Legislature by special act granted to the defendants the privilege of constructing another bridge within six hundred feet of that of plaintiffs, and calculated to accommodate the same line of travel, and to impair greatly the profits and value of plaintiffs' franchise. Defendants having commenced the construction of a bridge under this act, plaintiffs brought this action to enjoin its completion and its use for the purpose intended: *Held*, that plaintiffs were not entitled to the injunction. *Id.*

See **FRANCHISE**, 1, 7; **MUNICIPAL CORPORATION**, 8, 4.

### CASES AFFIRMED.

- Bond, Invalidity of*—*Sacramento v. Dunlap*, 14 Cal. 423, in *People v. Hartley*, 589.
- Estates of Deceased Persons, Foreclosure of Mortgage on*—*Fallon v. Butler*, 80, in *Pechaud v. Rinquet*, 76.
- Indictment*—*People v. Dolan*, 9 Cal. 576, in *People v. Vance*, 402.
- Intervention*—*Davis v. Eppinger*, 18 Cal. 378, in *Speyer v. Ihmels*, 287.
- Jurors, how Drawn*—*People v. Stewart*, 4 Cal. 218, in *People v. Vance*, 403.
- Justification of Sureties*—*Ryzech v. Van Hagen*, 18 Cal. 668, in *Tevis v. O'Connell*, 512.
- Lands Donated to State*—*Dell v. Meador*, 16 Cal. 296, in *Van Valkenburg v. McCloud*, 337.
- Limitation of Actions*—*Lord v. Morris*, 18 Cal. 482, in *McCarthy v. White*, 501.
- New Matter*—*Piercy v. Sabin*, 10 Cal. 22, and *Glazer v. Cliff*, *Id.* 303, in *Coles v. Soulesby*, 50.
- New Promise*—*Fairbanks v. Dawson*, 9 Cal. 89, in *Pefia v. Vance*, 149.
- Note made by Agent*—*Haskell v. Cornish*, 13 Cal. 45, in *Shaver v. Ocean M. Co.*, 46.
- Tenant in Common may Sue in Ejectment*—*Touchard v. Crow*, 20 Cal. 162, in *Hart v. Robertson*, 348, and *Mahoney v. Van Winkle*, 583.
- Vendor's Lien not Assignable*—*Baum v. Grigsby*, 177, in *Lewis v. Covillaud*, 189, and *Williams v. Young*, 228.
- Verbal Stipulations*—*Patterson v. Ely*, 19 Cal. 85, in *Reese v. Mahoney*, 308.
- Writ of Assistance under Foreclosure Decree*—*Montgomery v. Middlemiss*, 103, in *Montgomery v. Byers*, 108.

### CASES CITED AS AUTHORITY.

- Alcalde's Grants*—*Cohas v. Raisin*, 8 Cal. 443; *Dewey v. Lambier*, 7 Cal. 347; *Welch v. Sullivan*, 8 Cal. 165; *Payne v. Treadwell*, 16 Cal. 232, in *White v. Moses*, 40.
- Certiorari*—*Ex parte Attorney-General*, 1 Cal. 85; *People v. Shear*, 7 *Id.* 139, in *Miliken v. Huber*, 169.
- Commencement of Action*—*Sharp v. Maguire*, 19 Cal. 577, in *Pimental v. San Francisco*, 367.

*Consideration in Deed, Limitation to Proof of*—Bennett v. Solomon, 6 Cal. 135, in Coles v. Soulsby, 51.

*Decision on Appeal*—Nieto v. Carpenter, 7 Cal. 527; Phelan v. San Francisco, 20 Cal. 39, in Nieto v. Carpenter, 483.

*Dismissal, Effect of*—Dowling v. Polack, 18 Cal. 625, in Leese v. Sherwood, 164.

*Dying Declarations*—People v. Glenn, 10 Cal. 36, in People v. Lawrence, 372.

*Ejectment*—Coryell v. Cain, 16 Cal. 572, in Hubbard v. Barry, 324.

*Ejectment, Parties Defendant in*—Garner v. Marshall, 9 Cal. 268, in Dutton v. Warschauer, 619.

*Executors may Sue in Ejectment*—Meeks v. Hahn, 20 Cal. 620, in Burton v. Lies, 91, and Touchard v. Keyes, 209.

*Foreclosure, Remedy by*—Nagle v. Macy, 9 Cal. 429, in Fallon v. Butler, 33. *Parties in*—Montgomery v. Tutt, 11 Cal. 314; Goodenow v. Ewer, 16 Cal. 461; Boggs v. Hargrave, 16 Cal. 562, in Burton v. Lies, 91; Horn v. Volcano W. Co., 18 Cal. 107, in Montgomery v. Middlemiss, 107.

*Franchise—Bridges and Ferries*—Indian Cañon Road v. Robinson, 18 Cal. 519, in Fall v. Sutter Co., 252.

*Issues Raised by Denials*—Gavin v. Annan, 2 Cal. 494; McLarren v. Spalding, 511. Declared overruled in Piercy v. Sabin, 10 Cal. 22, and Glazer v. Clift, Id. 303, which latter cases are cited as authority in Coles v. Soulsby, 50; Higgins v. Wortell, 18 Cal. 330, in Wells v. McPike, 218.

*Judgment entered nunc pro tunc*—Black v. Shaw, 20 Cal. 68, in Savings & L. S. v. Gibb, 609.

*Judicial Sales*—Cowell v. Buckalew, 14 Cal. 641; Norris v. Harris, 15 Cal. 256; Payne v. Payne, 18 Cal. 292, in Fallon v. Butler, 31; Cloud v. El Dorada Co., 12 Cal. 133, in Clark v. Lockwood, 224; Kent v. Laffan, 2 Cal. 595; McMillan v. Richards, 9 Cal. 412, in Gross v. Fowler, 395.

*Jurisdiction of Supreme Court*—Haight v. Gay, 8 Cal. 297, in Milken v. Huber, 169.

*Legal Title to Prevail in Ejectment*—Estrada v. Murphy, 19 Cal. 272; Touchard v. Crow, 20 Cal. 160, in Clark v. Lockwood, 221.

*Mexican Grants*—Estrada v. Murphy, 19 Cal. 269, in Rico v. Spence, 511; Ferris v. Coover, 10 Cal. 592, in Berreyesa v. Schultz, 542; Mott v. Smith, 16 Cal. 551; Ferris v. Coover, 10 Cal. 621, in Mahoney v. Van Winkle, 576.

*Mortgage is a mere Security*—McMillan v. Richards, 9 Cal. 365; Nagle v. Macy, Id. 426; Haffley v. Maier, 13 Cal. 13; Koch v. Briggs, 14 Cal. 256; Clark v. Baker, Id. 612; Johnson v. Sherman, 15 Id. 287; Goodenow v. Ewer, 16 Id. 467; Fogarty v. Sawyer, 17 Id. 592; Lord v. Morris, 18 Cal. 487, in Dutton v. Warschauer, 621.

*Objections to Witness*—McCloud v. O'Neal, 16 Cal. 392, in Pierce v. Jackson, 641.

*Possession of Land*—Bequette v. Caulfield, 4 Cal. 278; Bird v. Lisbros, 9 Cal. 5, in Hubbard v. Barry, 325; Hunter v. Watson, 12 Cal. 363; Lestrade v. Barth, 19 Cal. 660, in Dutton v. Warschauer, 628.

*Review of Findings on Appeal*—Riley v. Heisch, 18 Cal. 201, in Nieto v. Carpenter, 484.

*Setting aside Judgment by Default*—Bell v. Thompson, 19 Cal. 706, in Lewis v. Rigney, 273.

*State Laws, Presumptions as to*—Norris v. Harris, 15 Cal. 253, in Hickman v. Alpengh, 226.

*State Patent Conclusive*—Doll v. Meador, 16 Cal. 831, in Rhodes v. Craig, 423.

*Tenant in Common may Recover whole Estate against Intruder*—Stark v. Barrett, 15 Cal. 871, in Hart v. Robinson, 348; Mahoney v. Van Winkle, 583.

*Vendors' Lien*—Sparks v. Hess, 15 Cal. 194; Taylor v. McKinney, 20 Cal. 618, in Baum v. Grigsby, 177.

### CASES COMMENTED ON.

*Change of Venue*—People v. Lee, 5 Cal. 853, in People v. Graham, 265.

*Diversion of Water, when not an Appropriation*—Maeris v. Bicknell, 7 Cal. 261; Ortman v. Dixon, 13 Cal. 83, in McKinney v. Smith, 381.

*Executors may Recover in Ejectment*—Meeks v. Harris, 20 Cal. 620, in Hart v. Robinson, 348. *Sale of Property under Will*—Payne v. Payne, 18 Cal. 291, in White v. Moses, 44.

*Foreclosure, Decree in*—Montgomery v. Tutt, 11 Cal. 814, in Montgomery v. Middlemiss, 107.

*Intervention*—Heyneman v. Dannenberg, 6 Cal. 876; Dixey v. Pollock, 8 Id. 570; Horn v. Volcano W. Co., 13 Cal. 62, in Speyer v. Ihmels, 287.

*Judgment, Recitals in*—Gregory v. Haynes, 18 Cal. 591, in S. C. 446.

*Law of the Case*—Table Mt. Tun. Co. v. Stranahan, 20 Cal. 198, in S. C. 551.

*New Matter*—Frisch v. Caler, 71, in Goddard v. Fulton, 436.

*New Promise*—Barron v. Kennedy, 17 Cal. 574, in Peña v. Vance, 149.

*Order not Appealable*—Adams v. Woods, 18 Cal. 30, in S. C. 165.

*Pueblo Lands*—Hart v. Burnett, 15 Cal. 530, in White v. Moses, 42.

*San Francisco*—Holland v. San Francisco, 7 Cal. 361; Argenti v. Same, 16 Id. 232; McCracken v. Same, Id. 591; Grogan v. Same, 18 Cal. 608, in Pimental v. San Francisco, 362.

*Setting aside Execution Sale*—Bryan v. Berry, 8 Cal. 135, in San Francisco v. Pixley, 59.

*Sureties in Replevin Liable*—Chambers v. Waters, 7 Cal. 390; Ginaca v. Atwood, 8 Cal. 446, in Mills v. Gleason, 279.

*Survey of Public Lands*—Cornwall v. Culver, 16 Cal. 429, in Mahoney v. Van Winkle, 577.

*Tenants in Common*—Riley v. Heisch, 18 Cal. 198, in Mahoney v. Van Winkle, 582.

### CASES OVERRULED.

*Action Lies against Executor to Foreclose Mortgage against Estate*—Ellison v. Halleck, 6 Cal. 386; Faulkner v. Folsom's Executors, Id. 412, in Fallon v. Butler, 30.

*Possession of Tenant is Notice of Title of Landlord*—Smith v. Doll, 13 Cal. 510, in Dutton v. Warschauer, 628. That an agreement between A. and B. that A. shall pay B's debt to C., cannot be enforced in an action by C. for want of privity—McLaren v. Hutchinson, 18 Cal. 80, in Lewis v. Covilland, 189.

## CERTIORARI.

1. CERTIORARI IN SUPREME COURT.—The Supreme Court cannot issue a writ of *certiorari* where its issuance would be the exercise of an original jurisdiction to superintend the proceedings of an inferior tribunal. *Miliken v. Huber*, 166.
2. CERTIORARI IN DISTRICT COURT.—The general power of supervision over inferior tribunals which pertains to the Court of King's Bench in England pertains to the District Courts in this State. *Id.*
3. CERTIORARI IN SUPREME COURT.—Nor can a writ of *certiorari* be issued by the Supreme Court where the act would be the exercise of appellate power, provided the review might have been had by an appeal, although the right of appeal is gone by the lapse of the time within which it was, by statute, required to be taken. *Id.*
4. CERTIORARI, WHAT MAY BE REVIEWED ON.—*Semble*, that no proceeding can be brought up for review by writ of *certiorari* from the Supreme Court, unless it be one properly the subject of an appeal but for which no right of appeal has been provided by law. *Id.*
5. IDEM—WHEN WRIT WILL NOT LIE.—H. against whom a judgment had been rendered in the District Court, after the lapse of more than one year thereafter applied to the Supreme Court for a writ of *certiorari* to the District Court by which the judgment might be brought up for review, alleging that the Court below had exceeded its jurisdiction by rendering the judgment against him without having obtained jurisdiction of his person: *Held*, that the case was not one in which the Court had power to issue the writ. *Id.*

## COMPOSITION.

See FRAUD AND STATUTE OF FRAUDS, 1; CREDITOR AND DEBTOR, 1.

## CONSIDERATION.

See DEED, 2.

## CONSTITUTIONAL LAW.

1. JUDICIARY SYSTEM—CONSTITUTIONAL AMENDMENT.—The purpose and effect of article six of the amendments to the Constitution recently adopted is not to suspend the administration of any portion of the laws of the State, but to provide a judiciary system which will go into operation when the necessary officers shall be elected pursuant to laws to be hereafter enacted, and to continue the former judiciary system in force until the new one shall be in a condition to exercise its functions. *In re Oliveres*, 415.
2. IDEM—ORGANIZATION OF NEW COURTS.—The Courts of Sessions continue as organized Courts with their jurisdiction unimpaired, notwithstanding the adoption of the constitutional amendments, until the organization of the new Courts by which, as provided in those amendments, they are to be superseded. *Id.*
3. AMENDMENT, EFFECT OF ON ORIGINAL PROVISIONS.—The old provisions of the Constitution will cease to have effect from time to time as the substituted provisions commence to operate. *Id.*

## CONTRACT.

1. CONTRACT WITH MUTUAL COVENANTS, TO BE EXECUTED BY ALL.—A contract, purporting to be made between several parties, containing mutual covenants of which

those of one party are the consideration of those of the others must, to be valid, be executed by all, and cannot be enforced against one executing, by another who fails to execute. *Teaksbury v. O'Connell*, 60.

2. **EFFECT OF REPEAL OF STATUTE.**—Where a contract is made and executed in pursuance of a statute, which also prescribes the parties against whom and the mode in which it may be enforced, the right to enforce it in the manner prescribed is a part of the contract, and is not affected by a subsequent act repealing the provisions in reference to the enforcement of the contracts authorized by the statute under which it was made. *Creighton v. Pragg*, 115.
3. **ORAL EVIDENCE TO VARY WRITTEN INSTRUMENT.**—The rule that verbal evidence is inadmissible to contradict or vary a written contract, is inapplicable where a mistake has been made and the object is to correct it. *Pierson v. McCahill*, 122.
4. **REFORMATION OF CONTRACT.**—Where in reducing an agreement to writing a material clause has been omitted by mistake, a party seeking to avail himself of the actual contract must obtain a reformation of the writing, either by a distinct proceeding to reform it or by specially pleading the mistake in the action in which the contract is sought to be used, and asking its correction as independent relief. Under a pleading which simply states the terms of a contract, the introduction of a written agreement respecting the subject matter cannot be followed by oral proof of a material clause alleged to have been omitted by mistake from the writing. *Id.*
5. **AGREEMENT INVALID FOR WANT OF CONSIDERATION.**—An agreement between a debtor and a single creditor for the acceptance by the latter of an amount less than the debt in satisfaction, is invalid for want of consideration; but such an agreement between a debtor and two or more creditors is valid, the engagement of one being a sufficient consideration for that of the others. *Id.*
6. **DEED, CONSIDERATION IN.**—In a deed of land the consideration was expressed to be \$10,000, \$4,000 paid in cash, "and the balance by the assuming, on the part of the said grantees, the payment of a certain mortgage" then existing upon the property to secure the grantor's note for \$6,000: *Held*, that this recital, unless controlled by evidence of a contrary intention, showed an agreement on the part of the grantees to pay the mortgage debt, and not merely to obtain a discharge of the mortgage as a lien upon the property. *Lewis v. Covillaud*, 178.
7. **AGREEMENT TO PAY DEBT.**—Where A owes B, and the latter owes C, and A and B, without consulting C, agree that the former shall pay to C what he is owing to B, an action cannot be maintained by C against A for want of privity. The doctrine of *McLarren v. Hutchinson*, 18 Cal. 80, commented on and questioned. *Id.*
8. **LAW OF PLACE PRESUMED.**—Where the validity of a sale made in a foreign State is drawn in question in the Courts of this State the law of the place of contract will be presumed, until the contrary is shown, to have been the same as that of our own State in reference to the same subject matter. This presumption extends to statutory as well as to the common law. *Hickman v. Alpaugh*, 225.
9. **IDEM—VALIDITY OF SALE HOW DETERMINED.**—Thus, where in an action in a District Court of this State, an issue was raised as to whether a sale of personal property made in Oregon was fraudulent, and no proof was made of the laws of Oregon: *Held*, that the validity of the sale must be determined by the common law and statutes in force in this State on the subject.

See FRAUD AND STATUTE OF FRAUDS, 1; MECHANICS' LIEN, 2; ARBITRATION, 2, 3; STATUTES, 2; LANDLORD AND TENANT, 1; LIMITATIONS, STATUTE OF, 3, 4, 12; ACTION, 2; APPEAL, 6; PARTITION; EQUITY, 1, 6; POSSESSION, 4; POWER.

## INDEX.

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### COSTS.

See PRACTICE, 24, 25.

### COUNTY.

See MUNICIPAL CORPORATION.

### COURTS,

See ESTATES OF DECEASED PERSONS, 1, 2; CERTIORARI, 1, 2; CONSTITUTIONAL LAW, 1-3.

### COVENANT.

1. COVENANT FOR QUIET ENJOYMENT.—Upon a covenant in a lease for quiet enjoyment the lessor is responsible only for his own acts and those of others claiming by title paramount to the lease and not for the acts of a mere trespasser, although the effect of these acts may be to deprive the lessee of the benefit of the lease. *Playter v. Cunningham*, 229.
2. IDEM—COMPLAINT INSUFFICIENT.—Thus, where a lessor was sued upon a covenant "that the lessees paying the rent shall peaceably and quietly have, hold, and enjoy the premises for the term mentioned," and the breach alleged was that the lessee had been prevented from entering by one R. who was in possession claiming to hold under a prior lease: Held, that the complaint was demurrable in failing to aver any sufficient breach of the covenant. *Id.*
3. IDEM—COMPLAINT SUFFICIENT.—If the complaint had averred that R. was in possession, actually holding under a superior title, it would have been sufficient without alleging that a suit had been brought and the validity of the title judicially determined. *Id.*

See PARTITION.

### CREDITOR AND DEBTOR.

1. AGREEMENT INVALID FOR WANT OF CONSIDERATION.—An agreement between a debtor and a single creditor for the acceptance by the latter of an amount less than the debt in satisfaction, is invalid for want of consideration; but such an agreement between a debtor and two or more creditors is valid, the engagement of one being a sufficient consideration for that of the others. *Pierson v. McCall*, 122.

See FRAUD AND STATUTE OF FRAUDS, 1; PAYMENT, 2.

### CRIMINAL LAW.

1. CHANGE OF PLACE OF TRIAL—POPULAR PREJUDICE.—The affidavit of the accused, that he cannot have an impartial trial in the county where he is indicted, is not alone sufficient to authorize a change of the place of trial. *People v. Graham*, 261.
2. IDEM—INSUFFICIENCY OF CAUSE.—Nor does the fact that thirty or forty persons in the community, upon being solicited, have contributed small sums to defray the cost of employing a lawyer to assist the District Attorney in the prosecution of a criminal action, show such a general prejudice in the citizens of the county as to require the granting of a change of venue. *Id.*
3. HEARSAY EVIDENCE INCOMPETENT.—On the trial, under an indictment charging an assault upon a young child, after the child had been examined as a witness by the prosecution, and had not been able, from her tender age, to state any material fact, it was proposed to ask another witness this question: "Did the child tell you how this occurred at the time?" and under the objection of defendant the Court

permitted the question: *Held*, that this was error, and that if the witness answered the question affirmatively, it was material error for which a new trial should be granted. *Id.*

4. CHILDREN AS WITNESSES.—That a child, for an assault upon whom defendant is being tried, not having sufficient capacity to be a witness, was sworn and questioned but withdrawn before she had testified to any material fact, is no ground for granting a new trial. The suggestion that her appearance was calculated to excite the sympathy of the jury and influence their judgment, is not entitled to any consideration. *Id.*
5. QUESTION BASED ON SUPPOSITION.—A question based upon the supposition of a state of facts not proved is improper. *Id.*
6. DECLARATIONS OF DEFENDANT.—An instruction embracing the proposition that what was said in his own behalf by the defendant, in a conversation proved between him and a witness, must be taken as true if what he said against himself is taken as true, is erroneous. *Id.*
7. OWNER CANNOT ROB ANOTHER OF HIS OWN PROPERTY.—The owner of property is not guilty of robbery in taking it from the person of the possessor, though he may be guilty thereby of another public offense. *People v. Vice*, 344.
8. KILLING IS PRESUMPTIVE MURDER.—Presumptively, every killing is a murder; but so far as the degree is concerned, no presumption arises from the mere fact of the killing, considered apart from the circumstances under which it occurred. *People v. Belencia*, 544.
9. MURDER, DEGREE OF.—The question of degree is one of fact, to be determined by the jury from the evidence; and drunkenness, as evidence of a want of premeditation, is not within the rule which excludes it as an excuse. *Id.*
10. DRUNKENNESS NO EXCUSE FOR CRIME.—A man who is drunk may act with premeditation as well as a sober one, and is equally responsible for the consequences of his act; but in determining the question of premeditation, the defendant's condition, as drunk or sober, and any other fact tending to show his mental status at the time, is proper for the consideration of the jury. *Id.*

See JUROR AND VERDICT, 1-3; EVIDENCE, 4, 5; INDICTMENT.

#### DAMAGES.

See EJECTMENT, 1; FORCIBLE ENTRY AND DETAINER, 1; CORPORATION, 1-4.

#### DECREE.

See JUDGMENT,

#### DEED.

1. EXECUTOR'S DEED AS EVIDENCE OF SALE.—An executor's deed is not admissible in evidence of a sale of a testator's property, except upon preliminary proof of a compliance with the statutory provisions for sales by executors and administrators, or of an express power in the will authorizing the sale in the mode in which it appears by the deed to have been made. *White v. Moses*, 43.
2. PAROL EVIDENCE OF CONSIDERATION IN DEED.—The consideration clause of a deed is not conclusive. It estops the grantor from alleging that he executed the deed without consideration. It cannot be contradicted so as to defeat the operation of the conveyance according to the purposes therein designated, unless it be upon the ground of fraud; but, with this exception, it is open to explanation, and may be varied by parol proof. *Coles v. Soulsby*, 47.

3. **DEED OF TENANTS IN COMMON, HOW EXECUTED.**—Where a number of tenants in common were parties to a deed of partition, by the terms of which each party conveyed and released his undivided interest in the whole premises in consideration of the conveyance to him of the undivided interests of the others in a specified portion, and the deed was signed by a large proportion of the parties, but not by all. *Held*, that as a conveyance it was void as to those who did sign, and that they still retained their interests as tenants in common in the whole tract. *Tecksbury v. O'Connell*, 60.
4. **DESCRIPTION OF PROPERTY IN DEED.**—The description of property in a tax deed must be certain of itself, and not such as to require evidence *aliunde* to make it certain. *Keane v. Cannovan*, 291.
5. **IDEM—DEED VOID FOR UNCERTAINTY.**—A tax deed in which the property is described as follows: "A lot on Dupont Street, one hundred and thirty-seven feet and six inches from the north-west corner of Washington Street, with the improvements thereon 12x100," is void for uncertainty of the description. *Id.*
6. **CONVEYANCE BY ATTORNEY—AUTHORITY MUST BE IN WRITING.**—The authority of an attorney to execute for his principal a conveyance of real estate must be in writing, and a deed purporting to have been executed by an attorney is inadmissible in evidence without proof being first made of the attorney's written authority. *Videau v. Griffin*, 389.
7. **IDEM—PAROL ACKNOWLEDGMENT WILL NOT RENDER VALID.**—When a deed has been executed by an attorney without any previous written authority, no subsequent parol acknowledgment of his authority by the principal will make the conveyance valid. *Id.*
8. **IDEM—EXCEPTION TO RULE.**—The only exception to the rule that an authority to execute a deed must be conferred by writing, is when the execution by the attorney is in the presence of the principal, and to bring a case within this exception it is not sufficient that the attorney was directed to sign the name of the principal and affix his seal, but the execution must have been in his immediate presence, and under his immediate direction. *Id.*
9. **IDEM—EXECUTION NOT INFERRED.**—The fact that the execution was in the presence of the principal must be affirmatively established by the party who relies upon it as an excuse for the absence of a power in writing, and it is not to be inferred from any coincidence between the date of the deed and an acknowledgment of the principal that it was executed by his attorney. *Id.*

See **ESTOPPEL**, 2; **TAXES**, 1; **CONTRACT**, 6; **SALE, JUDICIAL**, 12; **MORTGAGE**, 21-23.

## DEFAULT.

**DEFAULT HOW WAIVED.**—An acceptance by plaintiff's attorney of service of a demurrer, filed by a defendant after his default has been entered, is a waiver of the default. *Hestres, Administrator, v. Clements*, 425.

See **PRACTICE**, 9-11.

## DESCENT AND DISTRIBUTION.

See **HUSBAND AND WIFE**, 4.

## DESCRIPTION.

See **PLEADINGS**, 9, 10, 12.



## DISMISSAL OF ACTIONS.

See PRACTICE, 13-15, 19, 20; ACTION, 1, 2

## DYING DECLARATIONS.

See EVIDENCE, 4, 5.

## EJECTMENT.

1. **EJECTMENT—IMPROVEMENTS SET-OFF AGAINST DAMAGES.**—Where, in an action of ejectment, the proof shows that the entry of the defendants was upon a lot within the limits of an incorporated city, no presumption arises therefrom that they entered *bona fide* under any supposed rights amounting to color of title adverse to the owner, and under such proof they are not entitled to have the value of improvements made by them upon the premises deducted from the damages sustained by the plaintiff. *White v. Moses*, 34.
2. **EJECTMENT, LEGAL TITLE TO CONTROL.**—In ejectment the legal title must control. The plaintiff, establishing in himself the legal title, cannot be defeated by showing that such title was acquired by fraud, or is held by him in trust. These are considerations for a Court of Equity, which will control the legal title in his hands so as to protect the just rights of others. *Clark v. Lockwood*, 220.
3. **EJECTMENT—PATENT ADMISSIBLE TO PROVE LOCATION.**—The plaintiff in ejectment claimed title under a decree of confirmation of a Mexican grant, in which the tract confirmed was described as bounded upon the north by the Bernal Rancho, and to prove the position of this northern boundary offered in evidence a patent of the rancho issued by the United States: *Held*, that the patent was admissible, and was *prima facie* evidence of the location of the northern boundary of the tract sought to be recovered. *Id.*
4. **EJECTMENT—EVIDENCE OF EXTENT AND BOUNDARIES.**—Where the plaintiff in ejectment relies upon prior possession as evidence of title, a deed of the premises to him from one not shown to have had at the date of its execution either title or possession is admissible evidence, in connection with proof of entry and occupation under it, to show the extent and boundaries of the premises of which possession was claimed. *Keane v. Cannovan*, 291.
5. **EJECTMENT—TAX TITLE.**—Where in an action of ejectment the defendant claimed title under a tax sale, and to prove an admission of title in him by plaintiff, offered in evidence a complaint in an action by the plaintiff against a third person, in which it was averred that in consequence of the neglect of the plaintiff's agent the premises were sold for taxes and no redemption was made, and that the sale thereby became absolute, in consequence of which neglect of the agent the plaintiff had sustained damage: *Held*, that the complaint was inadmissible for that purpose; that the statements in it did not amount to an admission of title, and that even if they did the admission would not operate to transfer such title. *Id.*
6. **EJECTMENT—TITLE UNDER VAN NESS ORDINANCE.**—A defendant in ejectment for a lot in San Francisco, who had possession of the premises on the first day of January, 1855, and thence up to the passage of the Van Ness Ordinance, cannot invoke the protection of that ordinance when the issue in the action is whether his possession was acquired by an intrusion upon the prior rights of the plaintiff. *Id.*
7. **POSSESSION EVIDENCE OF SEIZIN IN FEE.**—The possession of real property is evidence of seizin in fee in the possessor, and no further or higher evidence of title

is required to enable a party claiming through the possessor to recover in ejectment until the defendant shows an anterior possession, or traces title from a paramount source. *Id.*

8. **EJECTMENT—PRIOR POSSESSION SUFFICIENT.**—The rule that the claimant in ejectment must recover upon the strength of his own title, is in this State so far modified that a plaintiff may recover upon proof of a possession prior to that of the defendant, notwithstanding it be shown that the real title is in a stranger, with whom neither party has any connection, and this, whether such real owner be an individual or a corporation, or the Government of the United States. *Hubbard v. Barry*, 321.
  9. **DEFENSES TO PART OF COMPLAINT AND DISCLAIMER.**—If the defendant in ejectment desires to defend for only a portion of the premises, and to limit his liability for mesne profits in a corresponding proportion, he must frame his answer accordingly and specify the portion of the premises for which it is intended to defend and disclaim as to the balance. *Guy v. Hanly*, 397.
  10. **IDEM.**—To a complaint in ejectment for a fifty vara lot, the answer admitted the possession of defendants to the extent of one-third, "more or less," and the witnesses who testified upon the subject stated that they (defendants) were "on the lot—a part of it"—without showing of what particular part they were in possession. The judgment was for the recovery of the whole lot, with damages for its detention, and on appeal it was assigned as error that the evidence warranted a recovery of only a portion of the lot with proportional damages: *Held*, that under the pleadings and proofs the judgment was proper. *Id.*
  11. **STATE PATENT AS EVIDENCE OF TITLE.**—Where the plaintiff in ejectment claims title under a State patent issued upon a school warrant location, the invalidity of the location cannot be interposed as a defense to the action, nor the efficacy of the patent be contested, by one in possession, who admits that the premises are a part of the public lands of the United States, and traces no title from the United States to himself. *Rhodes v. Craig*, 419.
  12. **EJECTMENT—PROOF OF PRIOR POSSESSION.**—In an action of ejectment where the plaintiff relied upon prior possession, his proof showed that several years before defendant's entry he inclosed the premises with a fence, and afterwards, and until the adverse entry, cultivated the inclosure by raising and gathering crops thereon; but there was no direct proof of the character of the fence or its efficiency: *Held*, that the possession was sufficiently proved; that the use of the property for a series of years, for purposes requiring an inclosure, was enough to show that the inclosure was a suitable one for those purposes, and sufficiently substantial to protect the premises. *Hestres v. Brannan*, 423.
- See ADMINISTRATOR AND EXECUTOR, 1, 2; MORTGAGE, 2; TENANT IN COMMON, 1, 5, 6; PRACTICE, 9; LANDLORD AND TENANT, 2, 11, 13; PLEADING, 9, 10; FRAUD AND STATUTE OF FRAUDS, 6; PUBLIC LANDS, 6; HUSBAND AND WIFE, 3, 4; POSSESSION, 2, 3; MEXICAN GRANT, 5, 10, 16, 19.

## EQUITY.

**SPECIFIC PERFORMANCE.**—Equity will not enforce the specific performance of a contract where the party asking its enforcement cannot, from the nature of the contract, be compelled to perform it specifically on his part. *Cooper v. Pena*, 404.

2. **IDEM—MUTUALITY ESSENTIAL.**—In order that a specific performance of a contract may be compelled, the remedy as well as the obligation must be mutual, and as a general rule the question of mutuality is to be determined by the contract itself, and is not affected by circumstances arising after the contract is made and the rights of the parties fixed. *Id.*

3. **IDEM—EXCEPTIONS TO RULE.**—The cases in which a want of mutuality at the time the contract has been entered into has been held not to be sufficient reason for refusing to enforce it—as in contracts with infants, those between lessor and lessee, trustee and *cestui que trust*, voluntary settlements, and the like—are exceptional cases in which peculiar considerations have been allowed to override the principle of mutuality, and they do not contravene the general rule as above stated. *Id.*
4. **SPECIFIC PERFORMANCE IN DISCRETION OF COURT.**—The specific performance of a contract is not a matter of course, but rests in the sound discretion of the Court upon a view of all the circumstances, and before the Court will act it must be satisfied that the contract is reasonable and equal in its operation. *Id.*
5. **CONTRACT FOR PERSONAL SERVICES WILL NOT BE ENFORCED.**—Equity will not enforce specifically a contract for personal services—especially where they are confidential in their nature and involve in their performance the exercise of discretionary authority—but will leave the party to his remedy at law. *Id.*
6. **IDEM—OFFER TO PERFORM.**—For the purpose of enforcing specific performance of stipulations, the consideration for which was an agreement by the plaintiff to perform personal services, an offer to perform these services is not equivalent to an actual performance. The rejection of the offer by the defendant excuses the performance as a condition precedent, but does not release the plaintiff from his obligation to perform so long as he insists upon the agreement. *Id.*
7. **TRADE MARK WILL BE PROTECTED.**—The name established for a hotel is a trade mark, in which the proprietor has a valuable interest, which a Court of Equity will protect against infringement. *Woodward v. Lazar*, 448.
8. **TRADE MARK OF HOTEL.**—W. leased a lot of land, on which he erected a building, in San Francisco, and used it as a hotel, to which he gave the name of "What Cheer House." Before the lease expired, he purchased an adjoining lot, upon which he erected a large building, and for a time occupied both buildings as the "What Cheer House," the principal sign being removed to the one last built. He soon after surrendered the leased lot, with the building which was on it, and continued the business, under the same name, entirely in the building which he had erected on the lot he had purchased. Two months afterwards, the defendants, having purchased the first mentioned lot and building, opened there a hotel, under the name of "The Original What Cheer House"—the word "original" being painted on the sign in small letters, and in a manner calculated to deceive the public into the supposition that it was the same name. In an action by W. against defendants, to restrain them from using the name of "What Cheer House" for their hotel: *Held*, that plaintiff was entitled to the relief sought, and that defendants should be enjoined from the use of the name. *Id.*
9. **MEXICAN GRANTS, ADVERSE CLAIMS TO.**—Where the parties each claimed the same premises under independent Mexican grants, and the defendant, with knowledge of the plaintiff's claim, proceeded to obtain a confirmation of his claim and a patent therefor: *Held*, that no equities could arise in favor of the plaintiff, and against defendant, from the latter's knowledge of the adverse claim, nor was he, by reason of this knowledge, affected with notice of any equitable rights of the plaintiff. *Rico v. Spence*, 504.
10. **CONCURRENT JURISDICTION IN LAW AND EQUITY.**—Where Courts of Law and Equity have concurrent jurisdiction, if a Court of Law has first acquired jurisdiction, and decided a case, a Court of Equity will not interfere to set aside the judgment, unless the party has been prevented, by some fraud or accident, from availing himself of the defense at law. *Dutil v. Pacheco*, 438.

11. **IDEM—EQUITY WILL NOT SET ASIDE.**—Where, therefore, the indemnifier has been notified of the action against the Sheriff, he cannot maintain a bill in equity to set aside the judgment obtained therein, except under such conditions as would have enabled him to maintain it had he been the nominal as well as real party defendant to the first action. *Id.*
  12. **DECREE REMOVING CLOUD ON TITLE.**—A decree pronouncing that a conveyance is fraudulent and void has the effect to remove any cloud resulting from its execution without an express direction that it be set aside. *Gibbons v. Peralta*, 629.
  13. **IDEM—INJUNCTION.**—Some two hundred persons, of whom plaintiff was one, claimed each separate parts of a tract of land called the "Encinal," deriving their several titles from a common source, and all through a deed of the whole tract from Peralta to Hays. Plaintiff brought the action for himself and on behalf of the others, whose titles were similarly situated, for the purpose of obtaining equitable relief against certain subsequent conveyances of the Encinal made by Peralta, alleged to be fraudulent, and to constitute a cloud upon the title derived through the deed to Hays, and asked, as a portion of the relief, a perpetual injunction against any further alienations by the fraudulent grantees (defendants.) The decree pronounced the subsequent conveyances fraudulent and void, and granted the injunction asked as to the plaintiff's separate portion of the land, but not as to that of the others for whom he sued: *Held*, on appeal by plaintiff from this decree, that it was not in this respect erroneous—that there was no such community of interest between the plaintiff and those whom he represented in the action as entitled him to an injunction in their favor. *Id.*
  14. **VOID GRANT BY MUNICIPAL CORPORATION.**—A municipal corporation cannot invoke the aid of a Court of Equity to set aside a grant made by its authorities when the grant is void. Such a grant, being a nullity, casts no cloud upon the title of the corporation, and offers no embarrassment to the exercise of its legitimate functions. *Oakland v. Carpentier*, 642.
  15. **VOIDABLE GRANT.**—Where the Board of Trustees of a municipal corporation makes a grant of its franchises and lands which is not void, but only voidable, the corporation cannot obtain the aid of a Court of Equity to set aside the grant without doing equity—that is, without tendering compensation to the grantee for the expenditures which he may have incurred under the grant, relying upon its validity. *Id.*
- See EJECTMENT, 3; TRUST AND TRUSTEE, 1-4; INDEMNITY, 1; FRAUD AND STATUTE OF FRAUDS, 3, 4; SALE, JUDICIAL, 9; PURCHASE AND PURCHASER, 1; MUNICIPAL CORPORATION, 5**

#### ESTATES OF DECEASED PERSONS.

1. **FORECLOSURE OF MORTGAGE AGAINST ESTATE OF DECEASED PERSON.**—An action may be maintained in the District Court against an executor or administrator, to foreclose a mortgage upon real estate executed by his testator or intestate, although the debt secured by the mortgage has been presented as a claim to the executor or administrator and allowed by him, and also by the Probate Judge of the county, where the only object of the action is to reach the property mortgaged and subject it to sale, and have the proceeds applied to the payment of the debt secured, and a judgment is not asked against the general estate of the deceased for the debt or any part of it. *Fallon v. Butler*, 24.
2. **PROBATE SALES—TO WHAT STATUTE APPLIES.**—The provision of the act regulating the settlement of the estates of deceased persons, declaring that no sale of any property of an estate shall be valid unless made upon an order of the Pro-

bate Court, applies only to sales by executors and administrators. It has no reference to judicial sales under the decrees of the District Courts, nor to sales in pursuance of testamentary authority. *Id.*

3. "CLAIMS" DEFINED.—The term "claims," as used in the act, does not embrace mortgage liens, but has reference only to such debts or demands against the decedent as might have been enforced against him in his lifetime by personal actions for the recovery of money, and upon which only a money judgment could have been rendered. *Id.*

See ADMINISTRATOR AND EXECUTOR, 1, 2; MORTGAGE, 3, 4; HUSBAND AND WIFE, 3, 4; PARTNERSHIP, 1, 2.

## ESTOPPEL.

1. DEED OF PARTITION, HOW MADE EFFECTUAL.—Where a deed of partition is invalid as a conveyance, by reason of its non-execution by some of those who are parties to it, it may become effectual by the parties taking and holding in severalty in pursuance of its terms and dealing with their respective portions as if owned in severalty, but such acts of ratification do not operate to make the deed a valid conveyance, but only by way of estoppel or as a determination of boundaries and only upon the interests of those performing them. A party who signed the deed is not estopped from insisting upon its invalidity by reason of any acts of ratification either of the others who did execute or of those who failed to execute. *Tewksbury v. O'Connell*, 60.
2. SELECTION AND LOCATION UNDER MEXICAN GRANT.—Where a Mexican grant cedes a specified quantity within a larger area, a selection and location of the specific quantity may be made by the grantee under such circumstances, and accompanied with such disclaimers, as to estop him from the assertion of any title or right to the possession of the remainder, existing within the exterior boundaries of the general tract, until by the action of the Government it is determined that his claim under the grant shall be satisfied by land elsewhere selected. *Mahoney v. Van Winkle*, 552.
3. INFANTS AND MARRIED WOMEN NOT ESTOPPED.—Infants and married women are incapable of giving any binding assent to a restriction of their rights to land claimed under a Mexican grant, or of making any disclaimers in respect to such rights which will bind them as an estoppel. *Id.*

See DEED, 2; LANDLORD AND TENANT, 5-9; MEXICAN GRANT, 5, 15-17; TENANT IN COMMON, 3.

## EVIDENCE.

1. ALCALDE'S RECORDS.—The books of record of deeds, mortgages, and other instruments, kept by Alcaldes previous to the organization of the State Government, which were transferred to the custody of the County Recorder by the Act of April 13th, 1850, entitled "An Act concerning the Transfer of certain Records, Conveyances, and Papers," have been placed by the twenty-first section of the Act of March 26th, 1851, entitled "An Act concerning County Recorders," upon a footing with other records kept by the County Recorders; and certified copies of instruments found therein are admissible in evidence under the same circumstances as are certified copies of records made by the Recorders themselves—namely, upon proof of the loss or the inability of the party to produce the originals. *Touchard v. Keyes*, 202.
2. IDEM—Per NORTON, J., *dissenting*.—The twenty-first section of the Act concerning County Recorders of March 26th, 1851, applies only to such records as are by that

act required to be kept in the Recorder's office. It has no application to the records of Alcaldes which by a previous act had been transferred to the custody of the Recorders, and a copy from such records is not admissible upon the certificate of the Recorder. *Id.*

3. **EFFECT OF FAILURE TO DENY.**—The admission by the Court, under the objection of defendants, of improper evidence offered by plaintiff to prove a fact alleged in his complaint and not denied in the answer is no cause for granting a new trial. *Wells v. McPike*, 215.
4. **DYING DECLARATIONS.**—Where, on trial upon an indictment for murder, the dying declarations of the deceased are introduced by the prosecution, it is error to exclude proof offered by defendant of other statements made by the deceased contradicting his dying declarations. *People v. Lawrence*, 368.
5. **IDEM—IMPEACHING WITNESS.**—Such proof is admissible under the general rule that the credit of a witness may be impeached by proof that he has made statements contrary to what he has testified, and the condition that the attention of the witness must first have been called to the supposed contradictory statements, is from necessity dispensed with in the case of dying declarations. *Id.*
6. **COPY OF NOTICE OF LOCATION AS EVIDENCE.**—In an action involving the right to and extent of a water privilege claimed by plaintiffs under an alleged appropriation by a number of copartners, defendants, to limit the extent of the appropriation, offered in evidence a paper, purporting to be a copy of the original locating notice of the copartners, and without direct proof of its execution, showed that it was prepared with a knowledge of some of the partners, and was seen as a posted notice by a portion of them at the point of diversion, and about the time the work was commenced, and that its position was such that it must probably have been seen by all: *Held*, that upon this proof the paper was admissible as part of the *res gestæ*. *McKinney v. Smith*, 374.
7. **PROOF OF DRUNKENNESS IN TRIAL FOR MURDER.**—On a trial for murder, under our statute, where the means employed in the killing are not such as to determine the degree of the offense, proof that the defendant was drunk at the time of the killing is admissible in his favor. *People v. Belencia*, 544.
8. **IDEM—WEIGHT OF EVIDENCE.**—The weight to be given to such evidence is a matter for the jury to determine; but it should be received with caution, and carefully examined in connection with the other circumstances. *Id.*

See PLEADING, 2; ADMINISTRATOR AND EXECUTOR, § 2; MECHANIC'S LIEN, 2; NEW TRIAL, 1; CRIMINAL LAW, 4, 6; CONTRACT, 3, 4; MEXICAN GRANT, 16; PRACTICE, 29.

#### EXCEPTION.

See JUROR AND VERDICT, 4.

#### FINDING OF FACT.

See APPEAL, 1, 5, 6; NEW TRIAL, 3.

#### FIXTURE.

See LANDLORD AND TENANT, 10.

#### FORCIBLE ENTRY AND DETAINER.

1. **FORCIBLE ENTRY AND DETAINER—RENTS AND PROFITS.**—In an action of forcible entry and detainer, the value of the rents and profits of the premises is not re-

- quired by the statute to be stated in the complaint, and without such statement may be awarded as damages. *Holmes v. Horber*, 55.
2. **EVICTON AS A DEFENSE IN FORCIBLE DETAINER.**—In an action by a landlord against his tenant under the thirteenth section of the Forcible Entry and Detainer Act, the latter may defend by showing an eviction under an adverse title in a judicial proceeding of which proper notice was given to the landlord. *Wheelock v. Warschauer*, 309.
3. **EFFECT OF EVICTION.**—Such a defense does not involve any question of title, the effect of an eviction being to dispossess the landlord as well as the tenant, and to relieve the latter from the obligations of his tenancy. *Id.*

## FOREIGN CONTRACT.

See CONTRACT, 8, 9.

## FRANCHISE.

1. **FRANCHISES GRANTED BY POLITICAL POWER.**—Franchises for erecting toll-bridges, or ferries, being sovereign prerogatives, belong to the political power of the State, and are primarily represented and granted by the Legislature as the head of the political power. *Fall v. County of Sutter*, 237.
2. **IDEM—POWER WHEN DELEGATED.**—Where the power of granting these franchises has been by legislative enactment delegated to subordinate tribunals, as in this State to the Courts of Sessions and Boards of Supervisors, such tribunals are only agents of the Legislature in this respect. *Id.*
3. **IDEM—GRANTS MADE BY SUBORDINATE TRIBUNALS.**—Grants made by these subordinate tribunals by virtue of the authority thus delegated, are equally valid as if made by the Legislature directly, and the effect of a grant by them is to give a right of property to the grantee or licensee which it is not in the power of the Legislature to divest or transfer to another, so long as the owner holds in obedience to law. *Id.*
4. **IDEM—GRANTS NOT EXCLUSIVE.**—Grants of franchises of this character, not being exclusive in their terms, do not confer upon the grantees any exclusive right to the line of travel which is accommodated by them, or to its profits, and do not estop the granting power from making other grants of like character, the effect of which is to impair the value and take away the profits of the franchise first granted. *Id.*
5. **IDEM**—Where the grant of such franchises is not in terms exclusive, the Government holding this power, to be exercised for the public interest and convenience, is not to be presumed to part with its right to make other grants which may impair the value of the first, and will not be held to have done so except where such an intent appears affirmatively and plainly. This intent is not shown from a mere grant of the franchise or privilege. *Id.*
6. **IDEM—BRIDGE AND FERRY FRANCHISES.**—The provisions of the Acts of 1850 and 1855, concerning bridges and ferries, prohibiting the subordinate granting tribunals from licensing a second bridge or ferry within one mile of a former one, except under certain conditions, one of which is where a second grant is required by the public convenience, impose no restrictions upon the power of the Legislature in making other grants. *Id.*
7. **PUBLIC CONVENIENCE A POLITICAL QUESTION.**—The question of what the public convenience requires, is a political not a legal one. Its decision rests with the Legislature and depends upon its discretion, the exercise of which, in the granting of a subsequent franchise, is conclusive and not reviewable in a Court of Justice. *Id.*

## FRAUD AND STATUTE OF FRAUDS.

1. **COMPOSITION BY CREDITORS—NOTE VOID FOR FRAUD.**—If the creditors of a failing debtor agree between themselves, with the assent of the debtor, to a composition of their respective debts, and to receive in lieu thereof securities of a certain character, and one of the creditors subsequently obtains from the debtor new notes of a character more favorable to the creditor than those provided for in the composition agreement, such new notes are void for fraud, not only as to the other creditors, but as to the assenting debtor. *Smith v. Owens*, 11.
2. **RESULTING TRUST—PROOF OF VERBAL AGREEMENT.**—Although a verbal agreement by A to purchase land for B may not be given in evidence to establish a resulting trust where the entire purchase money has been paid by A and the conveyance taken in his name, yet if any part of the purchase money is shown to have been paid by B, a verbal agreement may then be proved which shall have the effect to deprive A of all beneficial interest in the purchase, and to clothe the entire estate in his hands with a trust in favor of B. *Hidden v. Jordan*, 92.
3. **PURCHASE BY AGENT.**—Whether, where an agent employed by his principal to purchase lands pays the entire purchase money and takes a conveyance to himself, this is not such a breach of good faith as to warrant the reception of parol evidence to establish a trust in favor of the principal—*Query?* *Id.*
4. **STATUTE OF FRAUDS—PAROL EVIDENCE.**—The Statute of Frauds will never in equity be allowed to operate as a protection to fraud, and for the purpose of showing that a fraud has been committed, or is being attempted, parol evidence will be admitted, even against the words of the statute. *Id.*
5. **INSTRUCTION AS TO FRAUD ERRONEOUS.**—In an action of ejectment where the defendant claimed title through a purchase made at a sale under a power contained in a mortgage, the Court gave the following instruction: "If the jury believe from the evidence, that M. B. McKinney, the mortgagee mentioned in the mortgage, made by A. M. Jackson to him on the fifteenth day of May, 1850, employed W. H. Fairchild, the purchaser, to attend said sale as his agent, and to buy in the property specified in said mortgage at said sale for the benefit of said McKinney himself, and that said Fairchild was not a *bona fide* purchaser, but purchased said property for said McKinney, and that no consideration was passed between said Fairchild and said McKinney, then the sale was void." The jury found for plaintiffs who had judgment: *Held*, on appeal, that the instruction was erroneous in pronouncing the sale void on the supposed state of facts, and that, for this error, the judgment must be reversed. *Blockley v. Fowler*, 326.
6. **FRAUD NEVER PRESUMED.**—It is never presumed that a party has committed a fraud; and where fraud is alleged, for the purpose of depriving him of a right, it must be clearly made out. *McCarthy v. White*, 495.
7. **IDEM—FORECLOSURE OF MORTGAGE.**—Thus, in an action to foreclose a mortgage where K. defended as a subsequent purchaser of the mortgaged property, the lower Court having found as a fact that K. was the agent of plaintiff, and acted as such in procuring the note and mortgage, and receiving interest upon the note, but without stating more particularly the duties devolving upon him as agent, the Appellate Court refused to infer from this that his duties as agent were of a character which prevented him from contracting in relation to the property on which the debt was secured. *Id.*

See DEED, 6, 9; POWER.

## HIGHWAY.

See MUNICIPAL CORPORATION, 3, 4.



## HOMICIDE.

See INDICTMENT, 2, 3, 5, 6; EVIDENCE, 4, 5, 7, 8; CRIMINAL LAW, 9-11.

## HUSBAND AND WIFE.

1. **SEPARATE PROPERTY—SALE BY MARRIED WOMAN.**—The provision of the "Act defining the Rights of Husband and Wife," that a married woman cannot make any sale or other alienation of her separate property, except by an instrument in writing, has reference to property other than money. It does not contemplate that every time a married woman pays her money for articles purchased she must execute an instrument in writing in order to make a valid transfer of the money. *Coles v. Soulsby*, 47.
2. **COMMUNITY PROPERTY, PRESUMPTIONS AS TO.**—The presumption attending the acquisition of property, during marriage, by either husband or wife, is that the property belongs to the community. *Burton v. Lies*, 87.
3. **GIFT TO WIFE SEPARATE PROPERTY.**—Real estate conveyed to the wife during coverture by way of gift is her separate property, and she can maintain ejectment for its recovery after her husband's death without reference to any administration upon his estate. *Hart v. Robertson*, 346.
4. **CONVEYANCE TO WIFE COMMUNITY PROPERTY.**—Real property conveyed to the wife during coverture by deed of bargain and sale for a valuable consideration, becomes thereby the community property of herself and husband, and upon his death she succeeds as his survivor to an undivided half interest therein as tenant in common with the heirs to whom the other half interest descends, and may as such, where no administrator of the husband's estate has been appointed, maintain ejectment for the entire premises against a mere intruder. *Meeks v. Hahn*, 20 Cal. 620, commented upon and distinguished from the case at bar. *Id.*

## INDEMNITY.

1. **JUDGMENT AGAINST SHERIFF CONCLUSIVE ON INDEMNIFIER.**—The provision of the Practice Act making the judgment, in an action against a Sheriff, conclusive evidence against his indemnifier, where the latter has been notified of the action, is founded upon the principle that the action, under such circumstances, is in substance against the indemnifier—the real party in interest—and that he has in that action an opportunity to make any defense that may exist. *Dutil v. Pacheco*, 438.

See EQUITY, 11.

## INDICTMENT.

1. **INDICTMENT FOR ROBBERY.**—An indictment for robbery which fails to allege that the property taken was the property of some person other than the defendant, is fatally defective. *People v. Vice*, 344.
2. **OBJECTION TO INDICTMENT WHEN TO BE TAKEN.**—Where an indictment for murder is returned by the grand jury without being indorsed "a true bill" by the foreman, the objection to it, under the statute, must be made by motion before demurrer or plea, otherwise the defect is waived. *People v. Lawrence*, 368.
3. **INDORSEMENT ON INDICTMENT.**—The indorsement upon an indictment is not, in this State, essential to its legality and sufficiency. It is only evidence of the finding of the indictment, and the object of the statute in requiring it is simply to secure the authenticity and genuineness of the instrument. This end is equally attained when the indictment is presented by the grand jury in open Court, and is filed by the Clerk with the other records. *Id.*

4. **INDICTMENT FOR ROBBERY.**—An indictment for robbery must state that the property was taken from the person of another. If it merely state that it was taken from "another person," it is fatally defective. *People v. Beck*, 385.
5. **INDICTMENT FOR MURDER.**—An indictment for murder is not vitiated by the designation of the offense as "murder in the first degree." *People v. Dolan*, 9 Cal. 576, affirmed on this point. *People v. Vance*, 400.
6. **IDEM—MALICE HOW ALLEGED.**—It is not essential that the words "with malice aforethought" be used in an indictment for murder, provided terms are employed which, in their import, are equivalent. An indictment which charges that the offense was committed "wilfully, maliciously, feloniously, and premeditatedly," is in this respect sufficient. *Id.*

#### INFANT

See *ESTOPPEL*, 4.

#### INJUNCTION.

See *BRIDGES AND FERRIES*, 2; *EQUITY*, 7, 8, 14.

#### INSTRUCTION.

See *CRIMINAL LAW*, 7; *APPEAL*, 18.

#### INTERVENTION.

See *PRACTICE*, 16, 17.

#### JOINT DEBTORS.

See *LIMITATIONS, STATUTE OF*, 9; *BOND*, 1, 2

#### JUDGMENT.

1. **DEMURRER TO BE DISPOSED OF BEFORE ENTRY OF JUDGMENT.**—It is irregular to enter judgment against a defendant, on whose behalf a demurrer is on file, without disposing of the demurrer, and a judgment so entered will be reversed on appeal. *Hestres, Administrator, v. Clements*, 425.
- See *PROMISSORY NOTE*, 2, 3; *MORTGAGE*, 2, 6, 14, 15; *MEXICAN GRANT*, 1; *PRACTICE*, 6, 7, 23, 26; *ACTION*, 1, 2; *VENDOR AND VENDEE*, 1; *MEXICAN GRANT*, 9; *PARTITION*; *EQUITY*, 13, 14.

#### JURISDICTION.

See *MORTGAGE*, 1, 3; *PRACTICE*, 2; *CERTIORARI*, 1-5; *EQUITY*, 10.

#### JUROR AND VERDICT.

1. **SEPARATION OF JURORS AN IRREGULARITY.**—Where the jury in a criminal action, after having retired to deliberate upon their verdict, separate without permission of the Court, the irregularity is sufficient ground for setting aside a verdict of guilty rendered by them, unless it be shown affirmatively by the prosecution that the defendant was not prejudiced thereby. *People v. Brannigan*, 337.
2. **EXPRESSIONS OF THIRD PERSONS.**—A verdict of guilty in a criminal action will not be set aside on a showing that a third person expressed in the presence of the jury, while they were deliberating upon their verdict, a wish that the defendant should be convicted, where the expression appears to have been a mere passing remark and not part of a conversation in which the jury engaged. *Id.*

3. **CHALLENGE TO PANEL OF JURORS.**—It is not a good ground of challenge to the panel of trial jurors in the District Court, that it was not drawn and selected as required in sections fourteen and fifteen of the Act concerning Jurors, but was obtained by an order of the Court under the sixteenth section of the same act after the commencement of the term, and without any attempt having been made to comply with the preceding sections. *People v. Stewart*, 4 Cal. 218, affirmed on this point. *People v. Vance*, :00.
4. **OBJECTIONS TO FORM OF VERDICT MUST BE SPECIFIC.**—A general objection to the form of a verdict, without any specification of the particulars in which it is alleged to be defective, will not be considered. *Mahoney v. Van Winkle*, 552.

See APPEAL, 11.

## JUSTIFICATION OF SURETIES.

See UNDERTAKING, 5.

## LACHES.

See PRACTICE, 12, 19; UNDERTAKING, 6.

## LANDLORD AND TENANT.

1. **NOTICE TO QUIT—SUBSEQUENT OCCUPATION, HOW CONSTRUED.**—H. served upon his tenant B., who was occupying under him certain premises at a rent of two hundred and fifty dollars per month, a notice to quit. Before the time at which, by the effect of the notice, the tenancy would have terminated, B., through a third person, proposed to H. to continue his occupancy at a rent of three hundred dollars, with which proposal H. expressed himself satisfied, but did not in terms notify B. of his acceptance of it. B. continued to occupy the premises: *Held*, in an action by H. for rent at the rate of three hundred dollars per month, that it must be inferred that the subsequent occupation of B. was with the consent of H., on the basis of the proposal rather than as a trespasser, and that plaintiff was entitled to recover. *Hoff v. Baum*, 120.
2. **TENANT IN POSSESSION LIABLE FOR RENT.**—A tenant in possession of premises, who is sued in ejectment, is not released from liability to the plaintiff for the use of the premises from the fact that he has paid rent to his landlord. If compelled to pay any further sum by the action, he can have recourse upon his landlord for the same. *Keane v. Cannovan*, 291.
3. **EVICION AS A DEFENSE IN FORCIBLE DETAINER.**—In an action by a landlord against his tenant under the thirteenth section of the Forcible Entry and Detainer Act, the latter may defend by showing an eviction under an adverse title in a judicial proceeding of which proper notice was given to the landlord. *Wheelock v. Warschauer*, 309.
4. **EFFECT OF EVICTION.**—Such a defense does not involve any question of title, the effect of an eviction being to dispossess the landlord as well as the tenant, and to relieve the latter from the obligations of his tenancy. *Id.*
5. **EVICION A TERMINATION OF TENANCY.**—The rule which estops a tenant from disputing his landlord's title does not prevent him from showing that the tenancy has been determined, and he may treat an eviction, with notice, by one having an adverse title, as a termination of the tenancy, and thus resist any claim by the landlord either for rent or possession. *Id.*
6. **NOTICE OF EVICTION.**—The notice by a tenant to his landlord of proceedings to evict him may be oral. *Id.*

7. ACTION TO QUIET TITLE AGAINST TENANT CANNOT BE MAINTAINED.—An action cannot be maintained under the two hundred and fifty-fourth section of the Practice Act, by a landlord against his tenant in possession for the purpose of determining the validity of an adverse title set up by the tenant. *Van Winkle v. Hinckle*, 342.
8. ACTION AGAINST WHOM IT LIES.—The section of the statute above referred to must be construed as giving a remedy only against parties who are in a position to assert their rights, and not against those who are barred by a temporary estoppel as to the right asserted on the other side. *Id.*
9. RENUNCIATION OF TENANCY.—If a tenant renounce the tenancy in favor of an adverse title the landlord may elect to consider himself ousted and maintain ejectment, but he cannot claim possession through the tenant and at the same time bring an action against him to determine the title. *Id.*
10. NAME OF BUILDING NOT A FIXTURE.—A tenant, by giving a particular name to a building, as a sign of the hotel business, for which he uses it, does not thereby make the name a fixture of the building, and the property of the landlord upon the expiration of the lease. *Woodward v. Lazar*, 448.
11. EJECTMENT—LANDLORD MAY APPEAR AND DEFEND.—The action of ejectment must be brought against the actual occupant of the premises, if there be one. If such occupant be a tenant of another, the landlord may appear and defend in his name or be substituted in his place. *Dutton v. Warschauer*, 609.
12. IDEM—SUBSTITUTION OF LANDLORD TO BE ENTERED OF RECORD.—The appearance or substitution of the landlord should be entered of record, and only allowed upon notice to the parties. After it is once properly made, the tenant cannot interfere with any subsequent proceedings to the prejudice of the landlord. *Id.*
13. IDEM—PARTIES ON APPEAL.—Where, without any order of record, the landlord, at the request of the tenant, appeared in fact and conducted the defense to judgment in the lower Court: *Held*, that it was too late to object in the Appellate Court to the want of the order; and that the landlord was entitled to the control of the appeal. *Id.*

See COVENANT, 2, 8; EQUITY, 8.

### LIEN.

See MECHANICS' LIEN; VENDOR AND VENDEE; PURCHASE AND PURCHASER, 2, 8.

### LIMITATIONS, STATUTE OF.

1. PART PAYMENT MUST BE EVIDENCED BY WRITING.—A part payment does not take a debt from the operation of our Statute of Limitations, unless such payment is evidenced by a writing signed by the party to be charged thereby. *Pena v. Vance*, 142.
2. IDEM.—Section thirty-one of the Limitation Act excludes all acknowledgments and promises not in writing; and a promise implied from the fact of part payment constitutes no exception. *Id.*
3. MEMORANDUM ON BOND.—A memorandum indorsed upon an overdue bond, stating a receipt of a portion of the debt, and also extending the time and changing in some respects the terms of payment, signed by the obligee alone, but assented to by the obligor, is not a writing "signed by the party to be charged thereby," and does not affect the operation of the limitation statute. *Id.*
4. IDEM.—If the signing of such a memorandum by the creditor and the assent to it by the debtor be viewed as a new and distinct contract for the payment of money,

- it would be a mere verbal contract, an action upon which would be barred by the lapse of two years from the time of payment fixed by its terms. *Id.*
5. **LIMITATION OF ACTION FOR MONEY PAID FOR CITY SLIP PROPERTY.**—Claims against the city of San Francisco by the bidders at the attempted sale in December, 1853, for the purchase money paid on such sale, are within the fourth subdivision of the seventeenth section of the Limitation Act, and are barred by a failure to sue within two years from the date of the receipt of the money by the city. *Pimental v. City of San Francisco*, 351.
  6. **COMMENCEMENT OF ACTION, WHAT DEEMED.**—The filing of a complaint in the proper Court, without the issuance of a summons thereon, is the commencement of an action within the terms and meaning of the Limitation Act, and stops the running of the statute. *Id.*
  7. **LIMITATION OF ACTION ON NOTE BARS THE MORTGAGE.**—Where an action upon a promissory note, secured by a mortgage of the same date upon real property, is barred by our Statute of Limitations, the remedy upon the mortgage is also barred. *McCarthy v. White*, 495.
  8. **STATUTE OF LIMITATIONS IS A STATUTE OF REPOSE.**—It is not a correct theory of the Statute of Limitations that the expiration of the period fixed by it raises a presumption of payment, and that the effect of an acknowledgment is to rebut this presumption. The statute is to be regarded as one of repose, the benefit of which may be relinquished by the party interested, but cannot be taken from him without his consent. *Id.*
  9. **JOINT OBLIGORS—EFFECT OF ACKNOWLEDGMENT BY ONE.**—If two or more persons are bound, the statute affords the same protection to each, and an acknowledgment by one is not available against another, unless he had authority to make it, either expressly given or resulting from the relation of the parties. *Id.*
  10. **LIMITATION OF ACTION ON ENFORCEMENT OF SECURITY.**—The principles which govern as to the operation of the statute, and the effect of an acknowledgment, in cases of personal liability, are equally applicable to cases where an attempt is made to enforce a security. *Id.*
  11. **GRANTEE OF MORTGAGOR MAY PLEAD STATUTE OF LIMITATIONS.**—A party who, subsequent to the execution of a mortgage, purchases the property from the mortgagor, may avail himself of the Statute of Limitations as a defense to an action for the foreclosure of the mortgage commenced after the statute has run against the debt secured. *Id.*
  12. **IDEM.**—W. and K. owning a tract of land in common, W., in 1853, mortgaged his interest in a portion of the tract, containing four hundred and eighty acres, to M., to secure a note executed at the same time, and falling due March 4th, 1854. April 8d, 1856, W. and K. entered into a written agreement for the partition of the whole tract, by which the four hundred and eighty acres mortgaged was to belong exclusively to K., W. stipulating to make him a deed of the same as soon as it could legally be done. May 10th, 1858, M. and W. had an accounting, and signed a writing stating that there was a balance of \$1,706 60 then due on the note, and that the time of payment was extended to January 1st, 1859. April 8th, 1859, W., in pursuance of the agreement of 1856, executed a deed of the premises to K., who had notice of the previous transactions between W. and M. The agreement between W. and K. in 1856 was not recorded, nor did M. have actual notice of its existence until after May 10th, 1858. In an action by M. to foreclose the mortgage, in which K. set up as a defense the Statute of Limitations: *Held*, that this defense was available to him by reason of his interest in the property acquired under the agreement of 1856; that he was not affected by the acknowledg-

ment made by W. in 1858; that the want of knowledge of K.'s purchase by plaintiff when he received W.'s acknowledgment, and extended the time of payment, was not material, for the reason that the period of limitation had already expired, and that plaintiff gave no consideration for the acknowledgment.

13. *IDEM*.—*Held, further*, that if the debt had not been barred at the time of W.'s acknowledgment, the position of the plaintiff would have been different; that having no notice of the agreement of purchase, if he had suffered the statute to run, relying upon the acknowledgment, he would have been entitled to protection. *Id.*

See SAN FRANCISCO, 7.

#### MANDAMUS.

See APPEAL, 14; SAN FRANCISCO, 11-12.

#### MARRIED WOMAN.

See HUSBAND AND WIFE; ESTOPPEL, 4.

#### MECHANIC'S LIEN.

1. **MECHANIC'S LIEN FOR MACHINERY FURNISHED.**—Where machinery is sold for the purpose of being placed in a building owned by the vendee, with a view of converting it into a manufactory, and is actually used for that purpose, the vendor has a mechanic's lien upon the building for the price. *Donahue v. Cromartie*, 80.
2. *IDEM*.—**PAROL EVIDENCE TO EXPLAIN WRITTEN INSTRUMENT.**—Where the sale of materials, employed in the construction or alteration of a building, is made by a written contract, which is silent as to the purpose for which the articles sold were intended to be used, parol evidence is admissible to show such purpose and to establish thereby a mechanic's lien for the price in favor of the vendor. *Id.*
3. **MECHANIC'S LIEN—MATERIALS FURNISHED.**—It is not necessary to the establishment of a mechanic's lien that the labor or materials shall be employed in the making or erection of a building. It is sufficient if they are employed in the alteration of a building to adapt it to other than the original uses, or to change its form or structure. *Id.*

#### MEXICAN GRANT.

1. **EFFECT OF CONFIRMATION OF MEXICAN GRANT.**—A final decree of the United States Courts, confirming a Mexican grant, establishes conclusively the legal title of the grantee to the premises at the date of the presentation of his petition to the Land Commission. And where the confirmer claims in his petition as successor in interest of the original grantee of the Mexican Government by virtue of mesne conveyances from him, the decree is equally conclusive of the validity of his derivative title as of that of the original grantee. *Clark v. Lockwood*, 220.
2. **PETITION FOR GRANT.**—A petition presented to a Mexican Governor for the purpose of obtaining a grant of land is no part of the grant. It is only the declaration of the party who made it, or of the party by whose authority it was made, and is open to explanation. *Nieto v. Carpenter*, 455.
3. **MEXICAN GRANT.**—The grant is the operative instrument, and the representations made to the Governor cannot control the course or nature of the title. If those representations were in truth erroneous, and the mistake in them affected the grant in any respect, the fact could only be made available by the Government. *Id.*
4. *IDEM*.—**CONDITIONS IN.**—A Mexican Governor, in 1843, had authority to remove the restraint upon alienation contained in a condition annexed to a grant of land made by a previous Governor, in 1834. *Id.*

Government, in 1784, to graze his cattle on a tract of land in Los Angeles, took possession of said tract and occupied it until his death in 1804; subsequent to which, his four sons continued the occupation under the same permission, but claimed to be the owners of the premises. In 1832, two of the sons died, both of them leaving widows and one of them five children, surviving. In 1833, the two sons and the widows verbally agreed upon a partition of the premises, and to apply to the Governor of the Department for separate grants to them for the portions received by them respectively on their partition. A partition was accordingly made, and a petition was presented to the Governor representing that in 1784 Gov. Fages had granted the premises to their ancestor, Nieto, and given him the possession thereof, but that the title papers had been misplaced, and asking that separate titles be awarded to them for the several portions received by them on their partition. Upon the petition a decree was made by the Governor, July 27th, 1833, declaring that the parties were owners in fee of the premises and designating the portion falling to each, and directing that juridical possession be given to them. Afterwards, December 21st, 1833, a further decree was made by the Governor directing the execution of the titles, and delivery of juridical possession, and in 1834 the several grants solicited were issued. In the grant to *Josefa Cota*, the widow having the five children, was a recital that she had shown herself entitled to the estate of the deceased Nieto, and the form of the granting clause was a declaration to her of the ownership of the land. Her grant contained the usual conditions annexed to grants in colonization. In 1843, the Governor having released the condition against alienation, she conveyed the land to the defendant. The plaintiffs are the children of Josefa Cota and her husband the son of Nieto, and seek to recover the land upon the ground that a title vested in them on the death of their father as his heirs, which their mother Josefa had no authority to convey. It was shown upon the trial that Nieto never had any title from the Spanish Government, but only a written permission to graze cattle upon the tract of which he took possession: *Held*, 1st, that the presumption of title from the long possession of Nieto and his children was repelled and destroyed by the instrument under which such possession was had; 2d, that by the possession under the written permission no title was acquired by prescription; 3d, that neither by the averments in the petition, nor by any of the recitals in the decrees of the Governor, or in the grant to Josefa was she or the defendant estopped from denying that Nieto and his children had any title to the land; and 4th, that the title remained in the Mexican Government until the decree of concession made by the Governor in 1833, which was followed by the grants of the separate parcels in 1834; and that therefore the plaintiffs had no title, and could not recover. *Id.*

6. **EFFECT OF NON-PRESENTATION OF MEXICAN GRANT.**—Where claimants under Spanish or Mexican grants have never presented their claims for confirmation, under the Act of March 3d, 1851, such claims are to be treated as non-existent, and the land, so far as they are concerned, is to be considered as part of the public domain. *Rico v. Spence*, 504.

7. **MEXICAN GRANT, TITLE AND BENEFICIAL INTEREST IN.**—José and Sisto Berreyesa, in 1843, petitioned the Governor of California for a grant of eight leagues of land, known as "Las Putas," and in their petition represented that they were married, and had children, and also a considerable number of cattle and horses, and needed land on which to place them. On this petition, after a favorable report from his Secretary, the Governor ordered that a title issue to the petitioners for so much of the land as they could settle. No title issued upon this order; but for some unexplained reason the petitioners considered the concession which it directed as embracing four leagues of the tract solicited, and on the following day they presented a second petition, in which they stated that their families were very large,

and included their parents, children, and brothers, and besides that there were more than one hundred uncivilized Indians in their neighborhood whom it was necessary to maintain, and for these reasons prayed a grant to themselves of the other four leagues. The report of the Secretary on this petition speaks of it as presented for the benefit of the petitioners, and of their parents, children, and brothers. On this petition a grant was issued, conceding to José and Sisto the entire tract, and declaring it to be their property, and imposing upon them the usual conditions. This grant recited that the grantees had petitioned "for their personal benefit, and that of their families, and that of their parents and brothers." It being contended by the appellants, from these facts, that the parents and brothers of the petitioners as well as petitioners were beneficially interested in the grant: *Held*,

*First*—That no valid argument in favor of the position of appellants could be drawn from the character of the first order of the Governor, because the grant which transferred the title was not issued upon it;

*Second*—That the second petition, and the report of the Secretary upon it, taken together, showed that the parents, children, and brothers, were referred to only as inducements for enlarging the bounty of the Government to the petitioners, and not as distinct additional beneficiaries;

*Third*—That the recital in the grant did not control the course of the title—that it only disclosed the inducements which operated upon the Governor to make the grant, and that the language of the operative clauses entirely excluded the idea that any other person than the two Berreyesas who petitioned were to become invested with the title;

*Fourth*—That José and Sisto Berreyesa, the grantees, were invested by the grant with the full legal and beneficial title to the land, exempt from any trust in favor of the other members of the family. *Berreyesa v. Schultz*, 513.

8. PETITION FOR COLONIZATION GRANT.—The Mexican Regulations of 1828 required the applicant for lands, whether an *empresario*, head of family, or private person, to set forth in his petition to the Governor, "his name, country, profession, the number, description, religion, and other circumstances, of the families or persons with whom he wished to colonize," and though these particulars constituted considerations with the authorities in whom the granting power was vested, they did not in any respect control the course of the title against the operative words of transfer in the grant. *Id.*

9. VALIDITY OF GRANT HOW SETTLED.—A decree of the United States District Court, confirming a claim under a Mexican or Spanish grant, which has become final by the refusal of the Government to prosecute an appeal therefrom, and by stipulation of the District Attorney, settles forever the question of the validity of the grant. *Mahoney v. Van Winkle*, 552.

10. CONFIRMEE OF GRANT MAY MAINTAIN EJECTMENT.—A confirmer of a Mexican grant, after a decree confirming to him a specified quantity within exterior limits, fixed by the grant, embracing more than the quantity confirmed, may, until an official segregation is made, maintain ejectment, for any portion of the land embraced within the exterior limits against one in possession claiming to be a preëmptioner under the laws of the United States. *Id.*

11. SELECTION AND LOCATION UNDER MEXICAN GRANT.—Where a Mexican grant cedes a tract of land known by a particular name and specifies, in pursuance of the grantee's petition, that a certain quantity is embraced within the limits of the tract, and also that any surplus above the specified quantity which, upon a survey and measurement by the Government, may be found within its boundaries, is reserved for the benefit of the nation; such grant vests in the grantee the right to



has been determined that a surplus exists and the limits of the specific quantity granted are established. *Id.*

12. **SEGREGATION OF LAND UNDER MEXICAN GRANT.**—The grantee cannot, in such case, himself make the measurement and segregation, but must await the action of the Government. He is therefore directly interested until the official segregation to protect the entire tract from waste and injury, and to improve it; and until then third persons cannot question his right to the possession of the whole. *Id.*
13. **LAND EXEMPT FROM PREEMPTION.**—Until the official segregation of the specific quantity granted, the entire tract within the exterior boundaries of the grant is exempted from preemption and settlement by the legislation of Congress. *Id.*
14. **SEGREGATION HOW EFFECTED UNDER MEXICAN LAW.**—Under the Mexican law the segregation was effected by delivery of juridical possession which could only be made after the approval of the concession by the Departmental Assembly, and was therefore often delayed for years, yet in California the grantee took possession at once upon the issuance of the grant, and his possession was respected both by the authorities of the Government and adjoining proprietors. *Id.*
15. **SELECTION BY GRANTEE HOW FAR CONCLUSIVE.**—There is nothing in the nature of a colonization grant prohibiting the grantee from restricting his general right to the possession of the entire tract. And when the grantee selects his location and quantity, uses it, leases it, sells or mortgages it, and disclaims title to the remainder, the selection is obligatory on him until the Government overrules his election and assigns him the land elsewhere. *Id.*
16. **IDEM—EFFECT OF DISCLAIMER.**—In an action of ejectment the plaintiff showed that the premises in controversy were part of a tract called Laguna de la Merced, which, in 1835, was granted by the Mexican Government to one Galindo upon a petition representing the tract to be a league in length and a half of a league in width more or less; that the grant reserved to the nation any surplus that might be found above this quantity; that Galindo and his successors in interest had possessed the entire tract, which embraced a surplus, until 1853; that they had obtained from the United States tribunals a decree confirming to them the land, to the extent of the quantity specified, to be selected within the boundaries of the general tract; that no official segregation had been made of this quantity by either Government, and that plaintiff was a purchaser from the confirmees. The defendants claimed that their possessions, though within the tract, were outside of a selection which they alleged had been made by plaintiff's grantors in such manner that they and he were estopped from claiming the balance. To show this defendants offered to prove that previous to June, 1853, the lands occupied by them had been "townshipped and sectionized" like other public lands of the United States; that in September, 1853, the grantors of the plaintiff caused a survey to be made of the specific quantity designated in the grant; that the claimants under the grant assented to such survey when made; that afterwards some of the grantors sold, mortgaged, and leased portions of the lands lying within the survey, and to the defendants and others publicly disclaimed having any title to or interest in the residue of the general tract; that acting under such disclaimers and acts of some of the said grantors they made their locations; and that they were not within the lines of the said survey. The Court, on objection of plaintiff, excluded this testimony, and on appeal: *Held*, that the evidence offered did not tend to prove an estoppel or a selection binding on the plaintiff, and was therefore properly excluded, three of the claimants (who were seven in number) being at the time infants, and two of them being under the disability of coverture. *Id.*
17. **SELECTIONS HOW MADE.**—No party but the Government can question any selec-

tion made by the grantee under his grant. As against all other parties it is sufficient for the grantee to show that the land selected lies within the boundaries designated in the grant. But to restrict the possessory right of the grantee to the selection made, the selection must be accompanied with such disclaimers as to the residue of the general tract as to operate as an estoppel upon him. *Id.*

18. **OFFICIAL SURVEY.**—A survey made by the Surveyor-General of the United States for California to establish the location of a confirmed grant, under the Act of Congress of 1860, is of no binding force until it has become final in one of the modes pointed out by the act. Until then it is only a preliminary proceeding, not binding either upon the Government or the claimant. *Id.*
19. **TITLE UNDER MEXICAN GRANT.**—Per **NORTON, J.**—That a Mexican grant, ceding a specific quantity of land within exterior boundaries embracing a larger quantity, conveys a title upon which an action of ejectment, for at least the quantity specified, may be maintained, has been several times decided by this Court, and must be considered as settled so far as the question depends upon the judgments of the State Courts. If before a juridical survey the grantee can recover any particular portion, he can recover the whole. *Id.*

See **PARTITION**; **POSSESSION**, 4; **PATENT**, 1, 2; **EQUITY**, 9; **ESTOPPEL**, 3, 4.

### **MINING CLAIMS AND RIGHTS.**

See **APPEAL**, 18.

### **MISTAKE.**

1. **ORAL EVIDENCE TO VARY WRITTEN INSTRUMENT.**—The rule that verbal evidence is inadmissible to contradict or vary a written contract, is inapplicable where a mistake has been made and the object is to correct it. *Pierson v. McOahill*, 122.

See **PRACTICE**, 5; **MEXICAN GRANT**, 3.

### **MORTGAGE.**

1. **DECREE IN FORECLOSURE CONCLUSIVE.**—In an action of ejectment by a purchaser under a decree in a suit for foreclosure of a mortgage, to which the mortgagees were parties, against a subsequent lessee of the mortgagees, no question can be raised by the defendant as to the due execution of the mortgage. Of this fact the decree in the foreclosure suit is conclusive. *Hayes v. Shattuck*, 51.
2. **JURISDICTION OF DISTRICT COURT.**—The District Court has jurisdiction in an action for the foreclosure of mortgages upon the estates of deceased persons, *Fallon v. Buller*, (*infra* 24,) affirmed. *Pechaud v. Rinquet*, 76.
3. **FORECLOSURE OF MORTGAGE AGAINST ESTATE.**—In an action in the District Court against an administrator to foreclose a mortgage, executed by the intestate upon lands belonging to the estate, no judgment can be entered up for any deficiency which may remain after the application of the proceeds of the sale to the mortgage debt. *Id.*
4. **FORECLOSURE—PURPOSE OF ACTION.**—The action for the foreclosure of a mortgage upon real property is not brought for the possession merely of the property, except as such possession may follow the Sheriff's or master's deed, but to subject to sale the title which the mortgagor had at the time of executing the mortgage, and to cut off the rights of parties subsequently becoming interested in the premises; and executors and administrators do not possess *as* title, but only a temporary right to the possession. *Burton v. Lies*, 87.

5. **DECREE IN FORECLOSURE CONCLUSIVE.**—The decree in an action to foreclose a mortgage concludes the rights of all parties to the action, and the sale under it, consummated by the Sheriff's deed, passes, as against them, the entire estate held by the mortgagor at the date of the mortgage. The purchaser as against such parties is entitled upon the receipt of his deed to the possession of the premises, and, if necessary, to the aid of the Court in enforcing its delivery—and his right to this aid is not affected by the fact that pending the action the plaintiff may have executed to one of the parties defendant a conveyance of the whole or a portion of the premises embraced in the decree. *Montgomery v. Middlemiss*, 103.
6. **PURCHASER PENDING FORECLOSURE.**—A person who, pending an action for the foreclosure of a mortgage and with notice of its pendency, purchases from one of the defendants therein a portion of the mortgaged premises, occupies the same position as his grantor in reference to the issuance of a writ of assistance in favor of the purchaser under the decree. *Montgomery v. Byers*, 107.
7. **REDEMPTIONERS—ASSIGNEE OF JUNIOR MORTGAGEE.**—In a suit to foreclose a mortgage, K., a junior mortgagee of the premises, was made a party, and in accordance with the prayer of his answer the decree declared the amount of his lien and ordered the application of any proceeds of the sale remaining after satisfaction of the prior mortgage to be applied to its payment. The premises were sold under the decree to F. for an amount more than sufficient to satisfy the first mortgage, and the surplus was paid to K., but leaving the larger portion of his claim unsatisfied. This balance was assigned by K. to G. & B. who within the six months tendered the Sheriff the amount required by statute to redeem from the sale: *Held*, that G. & B. were redemptioners under the statute, and that F. was not entitled to the Sheriff's deed. *Frink v. Murphy*, 108.
8. **DECREE OF FORECLOSURE, EFFECT OF.**—A decree foreclosing a mortgage cuts off all right of such subsequent purchasers or incumbrancers as are made parties to the foreclosure action. *Shores v. Scott River Co.*, 135.
9. **TENANT IN POSSESSION, WHO IS.**—A person who, after the commencement of an action to foreclose a mortgage, acquires possession of the premises from one of the defendants and continues to occupy after a sale under the decree of foreclosure is a "tenant in possession," and liable as such to the purchaser for the rents and profits accruing between the sale and the execution of the Sheriff's deed. *Id.*
10. **MORTGAGOR IN POSSESSION, LIABILITY OF.**—After a decree foreclosing a mortgage, the mortgagor in possession is not, until a sale is made under the decree, accountable either for rents or for use and occupation, and is subject to no liability, except that he may be restrained from the commission of waste. *Whitney v. Allen*, 233.
11. **PURCHASE BY MORTGAGEE AT MORTGAGE SALE.**—Where, at a sale under a power contained in a mortgage, the mortgagee becomes the purchaser indirectly by having the mortgaged premises bid in for himself, such sale is not therefore void, but only voidable on the application in equity of the mortgagor. The legal title passes by the sale. *Blockley v. Fowler*, 326.
12. **GRANTEE OF MORTGAGOR MAY PLEAD STATUTE OF LIMITATIONS.**—A party who, subsequent to the execution of a mortgage, purchases the property from the mortgagor, may avail himself of the Statute of Limitations as a defense to an action for the foreclosure of the mortgage commenced after the statute has run against the debt secured. *McCarthy v. White*, 495.
13. **DECREE OF FORECLOSURE.**—Where some of the parties, defendants in an action to foreclose a mortgage, claim the property adversely to the mortgagor under paramount title, the decree should reserve their rights, not simply by a declaration

that their rights are reserved, but by so limiting the relief awarded as to protect them. *San Francisco v. Lawton*, 589.

15. **IDEM—RENTS AND PROFITS.**—Where defendants thus claiming adversely are in possession, a decree directing upon the sale (redemption not being made) a conveyance of the fee and a delivery of possession to the purchaser, and conferring upon him, until redemption made, the right to recover the rents, issues, and profits of the land, is erroneous. In such case the decree must be limited to a sale of the rights and interests which the mortgagor possessed at the date of his mortgage, leaving the purchaser to assert his right to the possession, after receiving his conveyance, by the ordinary action of ejectment. *Id.*
  16. **MORTGAGE A MERE SECURITY.**—The doctrine respecting mortgages which prevails in this State is, that a mortgage is a mere security operating upon the property as a lien or incumbrance only, and is not a conveyance vesting in the mortgagee any estate in the land either before or after condition broken. *Dutton v. Warschauer*, 609.
  17. **IDEM.**—This doctrine was established, not merely from a consideration of the provisions of the Statute of 1851, but also from a consideration of the real object and intention of the parties in executing and receiving instruments of this kind, and as embodying the principles recognized generally in the Courts of other States. *Id.*
  18. **IDEM.**—The provisions of the statute, however, led the Court to go beyond the decisions in other States adopting the equitable doctrine as to mortgages, and to carry that doctrine to its legitimate and logical result by regarding the mortgage as a security under all circumstances, both at law and in equity. *Id.*
  19. **IDEM.**—The character of the mortgage, as a mere security, is not changed by default in the payment of the debt secured, and payment after default operates as an extinguishment of the lien equally as payment at the maturity of the debt. *Id.*
  20. **POSSESSION BY MORTGAGEE.**—The interest of the mortgagee is not enlarged or affected by the fact that he is in possession under the mortgage. *Id.*
  21. **IDEM—LEGAL TITLE.**—A mortgagee after condition broken, whether in or out of possession, cannot convey the legal title, and his deed, as mortgagee alone, without a transfer of the debt, passes nothing. *Id.*
  22. **IDEM—RENTS AND PROFITS.**—When possession is taken by the mortgagee, after condition broken, by consent of the mortgagor, it will be presumed, in the absence of clear proof to the contrary, to be with the understanding that the mortgagee is to receive the rents and profits, and apply them to the debt secured; and, unless a limitation to the period of possession is fixed at the time, it will be considered as extending until the satisfaction of the debt. *Id.*
  23. **IDEM—MAY BE TRANSFERRED.**—The temporary possessory right thus acquired by the mortgagee may be transferred, and the transferee will be substituted to his position, and be subjected to the same liabilities. This, however, will not be effected by a deed, which does not purport to convey any possessory rights of the grantor, or his interest generally, but only such interest as he could convey as mortgagee, or by virtue of an express power from the mortgagor. *Id.*
- See **ESTATES OF DECEASED PERSONS**, 1, 2, 3; **PARTIES**, 1, 2; **WRIT OF ASSISTANCE**, 1-4; **REDEMPTION**, 1-3; **VENDOR AND VENDEE**, 1; **CONTRACT**, 6; **FRAUD AND STATUTE OF FRAUDS**, 6; **LIMITATIONS, STATUTE OF**, 7-13; **PARTNERSHIP**, 1, 2

#### MUNICIPAL CORPORATION.

1. **COUNTIES WHEN NOT LIABLE FOR ACTS OF OFFICERS.**—A *quasi* corporation, such as

## INDEX.

- a county, is not liable for the acts of officers or employes which it appoints in the exercise of a portion of the sovereign power of the State by the requirement of a public law, simply for the public benefit, and for a purpose from which the county, as a corporation, derives no benefit. *Sherbourne v. Yuba County*, 113.
2. **IDEM—FOR INJURIES BY PHYSICIAN.**—Thus, a county is not liable in damages to one who, while an inmate of the County Hospital, sustains injuries from unskillful treatment by the Resident Physician, or from the failure on the part of the officers of the hospital to supply sufficient and wholesome food. *Id.*
  3. **COUNTY LIABILITY IN DAMAGES.**—A county is not liable in damages at the suit of an individual for injuries sustained by him in consequence of the want of proper repairs to a bridge on a public highway of the county. *Huffman v. San Joaquin County*, 426.
  4. **INJURIES RESULTING FROM NEGLIGENCE.**—The statute devolves upon Boards of Supervisors the management and control of bridges in their respective counties, and upon Road Overseers of the county the duty of keeping bridges on public highways in repair; and if any remedy exist for injuries resulting from neglect to keep such bridges in repair, it must be sought against the Road Overseers or Supervisors personally. *Id.*
  5. **VOID AND VOIDABLE ORDINANCES.**—The Trustees of the town of Oakland, in 1852, by ordinance, granted to the defendant, H. W. Carpentier, certain franchises and lands, on condition that the grantee should erect certain wharves and other improvements, and pay to the town a certain per centage of the wharfage received. In 1853 the Board of Trustees ratified and confirmed the ordinance. In 1857, and after Carpentier, supposing the grant to be valid, had made expenditures in erecting the wharves and improvements required by the ordinance, the city of Oakland, the corporation which had succeeded to the rights and interests of the town of Oakland, commenced suit for the purpose of having the grant set aside, on the ground that it was obtained by fraud, and constituted a cloud on the city's title: *Held*, that if the ordinances granting the franchises and lands were void, there was no occasion for the interference of equity; that if they were only voidable, its interference could not be invoked until equity was done by the city, by placing, or offering to place, the grantee, who had relied upon the acts of the agents of the town, in the same position which he would have occupied but for his reliance upon their validity. *Oakland v. Carpentier*, 643.

See *SAN FRANCISCO*, 6, 8-16; *EQUITY*, 15, 16.

## MURDER.

See *CRIMINAL LAW*, 9-11; *EVIDENCE*, 4, 5, 7, 3; *INDICTMENT*, 2, 3, 5, 6.

## NEW TRIAL.

1. **NEW TRIAL, WHEN NOT GRANTED.**—A new trial will not be granted on account of the admission of improper evidence to prove a fact not material to the decision of the action, and independent of which the verdict is supported. *Clark v. Lockwood*, 220.
2. **NEW TRIAL ON INTERVENTION.**—Where the merits of the case were not investigated in the lower Court by reason of an uncertainty as to the proper mode of proceeding under the anomalous provisions of the Practice Act relating to interventions, the Supreme Court awarded a new trial, although the decision of the Court below upon the main question involved was approved, and the only error disclosed might have been cured by a direction to modify the judgment. *Speyer v. Ihmels*, 280.

## INDEX.

3. **NEW TRIAL, WHEN WILL BE DENIED.**—A new trial will not be ordered because of inaccuracy in the language of a finding of fact when it is sufficiently distinct as to the material question involved in the action. *McKinney v. Smith*, 374.
  4. **NEW TRIAL, WHEN WILL BE DENIED.**—A new trial will not be granted on the ground of surprise at the introduction of false evidence when the evidence related solely to a point not necessarily involved in the decision of the action and which in fact had no influence upon the judgment. *Guy v. Hanky*, 397.
  5. **IDEM.**—False testimony given by mistake or otherwise is sufficient to avoid a verdict or decision based upon it, if ordinary prudence has been observed by the losing party. *Id.*
- See **EVIDENCE**, 3; **CRIMINAL LAW**, 4, 5; **JUROR AND VERDICT**, 1, 2; **APPEAL**, 11, 13, 17, 18.

## NOTICE.

See **LANDLORD AND TENANT**, 6; **LIMITATIONS, STATUTE OF**, 12, 13; **EQUITY**, 9, 11, 12.

## OFFICE AND OFFICER.

1. **OFFICER—PRESUMPTION AS TO PERFORMANCE OF DUTY.**—Where an officer, in making a sale of property, acts under a naked statutory power with a view to divest, upon certain contingencies, the title of the citizen, the purchaser relying upon the execution of the power must show that every preliminary step prescribed by the law has been followed. No presumption is in such case to be indulged that the officer has performed his duty, or complied with the law. *Keane v. Cassanova*, 291.
2. **PRESUMPTION AS TO COMPLIANCE WITH LEGAL FORMALITIES.**—The rule by which a presumption of compliance with legal formalities in a sale by officers, or trustees, is sometimes raised by lapse of time with possession in the purchaser, only authorizes the presumption as to intermediate steps in the proceeding. That which is the foundations of the authority to sell, as well as the execution of the deed by which the sale is consummated, is not within the rule, and must in all cases be proved. *Id.*
3. **IDEM.**—Thus, if from lapse of time since the execution of a tax deed and possession by the purchaser under it, presumptions could be indulged in support of any of the preliminary acts essential to the exercise of the power of sale, they could only be in favor of the acts between the assessment and the execution of the deed, and not of the assessment itself, which was the foundation of all subsequent proceedings. *Id.*

See **SAN FRANCISCO**, 1; **MUNICIPAL CORPORATIONS**, 1-4; **MEXICAN GRANT**, 13.

## OPINION.

See **APPEAL**, 17, 18.

## ORDER.

See **APPEAL**, 14; **PRACTICE**, 22, 23.

## PAROL AGREEMENT.

See **FRAUD AND STATUTE OF FRAUDS**, 2-4.

### PARTIES.

1. **FORECLOSURE, NECESSARY PARTIES TO.**—In an action to foreclose a mortgage all persons beneficially interested in the mortgaged property at the time of the commencement of the action must be made parties. *Burton v. Lies*, 87.
  2. **IDEM—WIDOW OF DECEASED MORTGAGOR.**—Where the mortgagor of real property sells and conveys his estate to a married man, and after the death of the grantee (his wife surviving) the mortgagee seeks to foreclose, the widow is a necessary party to the action. *Id.*
  3. **ASSIGNMENT OF PORTION OF DEBT.**—An assignment by a creditor of a portion of a debt does not make the assignee a joint owner of the whole debt, and he is not a necessary party to a suit for its recovery. *Leese v. Sherwood*, 152.
  4. **EXECUTOR OF COTENANT MAY UNITE IN ACTION.**—Tenants in common can unite in this State by statute in an action for the possession of real property, and the executor of a deceased tenant in common can unite with the cotenants of his testator in such actions. *Toucharde v. Keyes*, 202.
  5. **MISJOINDER OF PARTIES—OBJECTION HOW TAKEN.**—A misjoinder of parties plaintiff must be objected to by demurrer or answer, and cannot in the absence of such objection be made a ground for nonsuiting such of the plaintiffs as show themselves entitled to recover. *Rouse v. Bacigaluppi*, 683.
- See **VENDOR AND VENDEE**, 1; **PRACTICE**, 22, 23; **EQUITY**, 11, 12, 14; **PARTNERSHIP**, 1, 2; **TENANT IN COMMON**, 5, 6.

### PARTITION.

1. **PARTITION CANNOT BE MADE TILL FINAL SURVEY OF GRANT.**—The plaintiffs purchased from certain grantees of the Mexican Government an undivided one-half of the San Lorenzo Rancho, and received a deed therefor containing a covenant from their grantors who retained the other moiety, that they, plaintiffs, should have a right to an immediate partition, and might divide the premises by a line running east and west or north and south, and upon such division take the west half in one case and the north half in the other. Before the commencement of the present action the title of the grantees of the Mexican Government had been confirmed in the United States Courts, but the boundaries were not definitively fixed, the last survey by the Surveyor-General having excluded about 1,500 acres on the south side which had been embraced within the lines as fixed by the decree of the Land Commissioners, and for the correction of this alleged error in the survey, proceedings were pending. The object of the action was to obtain a partition of that portion of the premises embraced within the Surveyor-General's survey, the plaintiffs setting up their deed as the basis of their right to the partition, and praying that the northern half of this surveyed portion should be set apart to them, leaving the 1,500 acres subject to future arrangement. The decree adjudged that, by the covenant in the deed, plaintiffs were entitled to the partition as sought, and awarded to them the northern half of the surveyed portion in accordance with a division made by commissioners appointed for that purpose by an interlocutory order of the Court. From this decree the defendants, consisting of the other owners and certain incumbrancers, appealed: *Held*, that the decree was erroneous; that, under the covenants of their deed, plaintiffs could not have set apart to them the northern half of the surveyed portion, and at the same time retain an undivided interest in another portion upon the south side. *Hathaway v. De Soto*, 191.
2. **PARTITION OF GRANT, WHEN CAN BE MADE.**—The proceedings for a partition should either be delayed until a final survey is made, or until a patent issues, or that the

partition should be made according to the boundaries, as they might be ascertained in the present proceeding from the description in the original grant. *Held, further*, that even with the consent of respondents to release all claims to the unsurveyed 1,500 acres on the south, the decree could not be modified by this Court so as to award to plaintiffs the portion set apart to them in the decree in full satisfaction of their claims, inasmuch as the boundaries being, by the facts appearing in the record, still undetermined, it was possible that by the final survey the southern boundary might be fixed still north of the line established by the Surveyor-General. *Id.*

See DEED,

#### PARTNERSHIP.

1. **MORTGAGE ON SEPARATE PROPERTY OF PARTNER TO SECURE DEBT OF THE FIRM.**—Where one of two partners executes a mortgage upon his separate property to secure a debt of the firm, an action to foreclose the mortgage may, after the death of the mortgagor, be maintained against his executor, without any showing by the plaintiff that the partnership is insolvent, or that he has pursued his remedy upon the debt against the surviving partner. *Savings and Loan Society v. Gibb*, 595.
2. **IDEM—PARTIES IN ACTION TO FORECLOSE.**—In such action, where the surviving partner is also the executor of the deceased partner, and claims as his devisee an interest in the mortgaged property, there is no misjoinder in making him, as an individual, a codefendant with himself as executor. *Id.*
3. **WAIVER OF GRACE ON NOTE.**—One partner may waive grace upon a firm note made by him, and where such note is made payable on demand without grace an action upon it commenced the next day after its execution is not prematurely brought. *Pierce v. Jackson*, 636.
4. **FIRM LIABLE FOR NOTE MADE BY PARTNER.**—M. and J. were partners, and in the regular course of their business as storage merchants, of which M. had the management, received from plaintiff for storage a lot of grain, M. receipting for it in the firm name. Afterwards, the grain having been lost or converted, M. executed to plaintiff a firm note for its value. In an action upon this note J. defended for himself, averring that the note was in effect the individual note of M., and not binding on the firm, and introduced as evidence certain accounts respecting the transaction kept by M., purporting to be between plaintiff and M. individually, and also letters from M. to plaintiff, showing that M. had separate dealings with plaintiff, and had designedly kept J. in ignorance respecting the grain transaction: *Held*, that the note, from the circumstances under which it was made, was the note of the firm, on which J. was liable; that the onus was on him to show a discharge from this liability, and that the evidence introduced was insufficient for this purpose. *Id.*

See EVIDENCE, 6.

#### PATENT.

1. **IMPEACHMENT OF PATENT.**—Until the validity of a grant from the Spanish or Mexican Government has been determined by the tribunals of the United States, under the Act of Congress of March 3d, 1851, it cannot be made the basis for impeaching a patent for the same premises. *Rico v. Spence*, 504.
2. **PATENT CONCLUSIVE.**—Thus, where the validity of the claim of the defendant, under a Mexican grant, had been recognized and confirmed, and a patent to him issued thereon by the United States: *Held*, that the plaintiff, relying solely upon



## INDEX.

an opposing unconfirmed grant from the Mexican Government, embracing the same premises, could not call in question the rights of the defendant either in law or equity. *Id.*

See EJECTMENT, 3; EQUITY, 9.

### PAYMENT.

1. ASSIGNMENT AS A DEFENSE.—H. and three others executed to different persons negotiable promissory notes. Before the maturity of the notes the payees, for a valuable consideration, assigned them to H. After maturity H., for a valuable consideration, assigned them to plaintiff. In an action by plaintiff upon the notes against all the makers: *Held*, that the assignment to H. amounted to payment, and that, plaintiff having received the notes after their maturity, the defense was available against him. *Gordon v. Wansey*, 77.
2. PAYMENT BY BILL OF EXCHANGE.—Where a creditor receives, on account of his debt, a bill of exchange drawn in his favor by the debtor upon a third person, it operates but as a conditional payment; if, however, the creditor fails to present it to the drawee for acceptance or payment as required by the rules of commercial law, it becomes thereby an actual charge against him, and operates *pro tanto* as a satisfaction of his demand. *Brown v. Cronise*, 386.

See PLEADING, 7, 17; PROMISSORY NOTES, 4; LIMITATIONS, STATUTE OF, 1; MORTGAGE, 19.

### PLEADING.

1. AGREEMENT OF COMPOSITION MUST BE SPECIALLY PLEADED.—Where, to an action upon a promissory note, an agreement of composition between the debtor and his creditors, including the plaintiff, is relied upon as a defense, such agreement must be specially pleaded, and cannot be considered under a plea of accord and satisfaction by the giving of new notes. *Smith v. Owens*, 11.
2. SPECIAL DEFENSE—OMISSION TO PLEAD, NOT CURED BY EVIDENCE.—Where a defense is required to be pleaded specially, the omission to plead it is not cured by the introduction of evidence in support of it on the trial without objection on the part of the plaintiff. *Id.*
3. ACCORD AND SATISFACTION.—Accord and satisfaction, as a defense to an action for the recovery of money, must be specially pleaded. *Coles v. Soulsby*, 47.
4. ISSUES RAISED BY DENIAL.—A denial, whether general or special, only puts in issue the allegations of the complaint. The difference between a general and special denial in this respect is only in the extent to which the allegations are traversed. *Id.*
5. NEW MATTER.—New matter must be specially pleaded; and whatever admits that a cause of action, as stated in the complaint, once existed, but at the same time avoids it—that is, shows that it has ceased to exist—is new matter. *Id.*
6. COMPLAINT ON NOTE—ALLEGATION MATERIAL.—In a complaint upon a promissory note an allegation of its nonpayment is material, and if omitted the complaint is demurrable. The averment that there is a certain amount due upon the note is insufficient, being a statement of a mere conclusion of law. *Frisch v. Caler*, 71.
7. PLEA OF PAYMENT DEEMED CONTROVERTED.—A plea of payment in an answer to a complaint upon a promissory note is not new matter, and was not, under the former practice requiring a replication to new matter, admitted by a failure to reply. *Id.*

8. **NEGATIVE ALLEGATIONS.**—Where a negative allegation is necessary in stating the cause of action, although it must, of course, precede an averment by the opposite party of the fact negatived, it nevertheless constitutes the basis of the issue joined by the subsequent averment, and the latter operates as a traverse and not as an averment of new matter. *Id.*
9. **EJECTMENT—DESCRIPTION OF PREMISES IN COMPLAINT.**—A description of real property in a complaint in ejectment giving one of the lines bounding the premises as running due west to the *source* of a designated creek, is not so insufficient and indefinite as to sustain a demurrer on the ground of its alleged insufficiency. If there be in fact more than one *source* of the creek, that fact cannot be taken advantage of by demurrer. It can only be matter for proof on the trial. *Carpentier v. Grant*, 140.
10. **IDEM.**—A description of premises in a complaint as follows: "Commencing at a point in the Walnut Creek three hundred yards north of the Mt. Diablo base line; thence running due east two miles; thence due south to a point; thence *due west* to the *source* of said Walnut Creek; and thence down said creek to place of beginning;" *Held*, to be sufficient on demurrer. *Id.*
11. **EVASIVE DENIAL OF INDEBTEDNESS.**—In answer to a verified complaint in assumption a denial of the indebtedness merely, without a denial of the facts which show the existence of the indebtedness, is but a denial of a conclusion of law and raises no issue. *Wells v. MoPike*, 215.
12. **COMPLAINT ON UNDERTAKING.**—A complaint, in an action upon a statutory undertaking, which contains no other description of the instrument than an allegation that it corresponds with the provisions of a certain section of the Practice Act, is defective. The defect, however, being of form rather than of substance, objection to it must be taken by demurrer to the complaint. *Mills v. Gleason*, 274.
13. **INTERVENTION—PLEADINGS ON.**—Where a subsequent attaching creditor intervenes in an action for the purpose of setting aside an attachment issued therein, on the ground that there is no debt due from the defendant to the plaintiff, the allegations in the pleading on the part of the intervenor traversing the complaint, have the same effect as denials in an answer and require affirmative proof by the plaintiff of his cause of action, in default of which the intervenor will have judgment in his favor. *Speyer v. Ihmels*, 280.
14. **FAILURE TO DENY, EFFECT OF.**—An allegation in a complaint, not material to the statement of the plaintiffs' cause of action, is not admitted by a failure on the part of the defendant to deny it in his answer. *Canfield v. Tobias*, 349.
15. **IMMATERIAL ALLEGATIONS.**—The only allegations essential to a complaint are those required in stating the cause of action. Allegations inserted for the purpose of intercepting and cutting off an anticipated defense are superfluous and immaterial and do not require an answer. *Id.*
16. **ALLEGATIONS ANTICIPATING DEFENSE IMMATERIAL.**—The only object to be gained by a plaintiff in anticipating a defense and replying to it in advance is to put the adverse party upon his oath without making him a witness, and the effect of allowing this would be to establish a system of discovery in conflict with the spirit of the statute. *Id.*
17. **IDEM.**—The complaint stated a cause of action for goods sold, and, in addition, with a view to meet a probable defense of payment based upon the giving of certain notes by defendant and a receipt in full by plaintiff, stated the making of the notes and receipt and alleged facts attending the transaction which if true avoided its effect as payment by reason of fraud and misrepresentation on the part of defen-

dant. The answer admitted the original demand and averred payment by the notes referred to in the complaint, but did not deny in proper form the allegations in the complaint respecting the fraud of defendant in the transaction. The case was submitted on the pleadings and plaintiff had judgment: *Held*, that the judgment was erroneous; that the allegations of the complaint in reference to the transaction claimed to operate as payment were not material allegations requiring a denial, and were not therefore admitted by the failure of defendant to deny them. *Id.*

18. **ANSWER—AFFIRMATIVE ALLEGATIONS IN EFFECT DENIALS.**—Where the allegations of an answer, although stated in an affirmative form, are in effect only a denial of the allegations of the complaint, they do not constitute new matter within the meaning of our Practice Act. *Goddard v. Fullon*, 430.
19. **NEW MATTER IN ANSWER.**—If the answer either directly or by way of necessary implication admits the truth of all the essential allegations of the complaint which show a cause of action, but sets forth facts from which it results that, notwithstanding the truth of the allegations of the complaint, no cause of action existed in the plaintiff at the time the action was brought, those facts are new matter; but if the facts averred in the answer only show that some essential allegation of the complaint is untrue, then they are not new matter, but only a traverse. *Id.*
20. **ANSWER ON PROMISSORY NOTE NEW MATTER.**—To a complaint in the usual form upon a promissory note, an answer was filed admitting the signing of the note but averring that it was made, not on account of any indebtedness existing between the parties but for the purpose of being used as collateral security for a debt due to a third person, from the maker and payee jointly; that the joint debt was subsequently paid, and that the note having thus become *functus officio* should have been canceled, but through fraud was taken and held by the payee, and transferred without consideration by him to the plaintiff: *Held*, that these allegations were not new matter, which, under the system of replications then in force, was admitted by a failure to reply; that their only effect was to deny that any obligation of the character counted upon in the complaint was ever created by the signing of the instrument, and thus to traverse its essential allegations. *Id.*
21. **SETTING ASIDE GRANT.**—A complaint in equity, filed for the purpose of setting aside a grant, on the ground that it was obtained by fraud, must state specifically and definitely the facts constituting the fraud. *Oakland v. Carpentier*, 642.

See PROMISSORY NOTES, 2, 3; FORCEIBLE ENTRY AND DETAINER, 1; EVIDENCE, 3; COVENANT, 2, 3; PRACTICE, 27; TENANTS IN COMMON, 6; EJECTMENT, 9.

## POSSESSION

1. **POSSESSION OF LAND BY INCLOSURE.**—The mere inclosure of a lot with brush fence from two to three feet high, without any other steps being taken to subject the property to any use, is not sufficient evidence of ownership or right of possession in the plaintiff to sustain ejectment against one subsequently entering upon the premises. *Hutton v. Schumaker*, 453.
2. **POSSESSION—ACTS TO OBTAIN, HOW CONSTRUED.**—Per NORTON, J.—What acts done upon land will constitute such a possession as will enable a party to maintain an action of ejectment against one afterward entering, may depend upon the intent with which such acts were done, to be gathered from the acts themselves and other surrounding circumstances. *Id.*
3. **TITLE BY PRESCRIPTION.**—To establish a prescriptive title under the Spanish law or to constitute a foundation for adverse possession at the common law, the in-

strument under which the occupant entered and claims the premises must purport in its terms to transfer the title—must be such as would in fact pass the title, had it been executed by the true owner in proper form (with the exception perhaps of a contract to convey after payment of the consideration) and the occupant must have entered under it in good faith, in the belief that he had a good right to the premises, and with the intention to hold them against the whole world. *Nieto v. Carpenter*, 455.

See EJECTMENT, 1, 4, 7, 8, 12; PUBLIC LANDS, 1, 8; WRIT OF ASSISTANCE; ACTION, 5; MEXICAN GRANT, 11; MORTGAGE, 20-23; PURCHASE AND PURCHASER, 1, 8.

## POWER.

1. **POWER OF ATTORNEY NOT UNDER SEAL.**—A power to sell and convey land not under seal, and therefore insufficient to authorize the execution of a conveyance of the fee, is nevertheless sufficient authority for the execution of a contract of sale; and a deed made by the donee reciting the sale, and purporting, in pursuance of the power, to convey the fee, is a sufficient "note or memorandum" of such contract, and though inoperative as a conveyance is good as an agreement to convey. *Dutton v. Warschauer*, 609.

See ADMINISTRATOR AND EXECUTOR, 2; MORTGAGE, 12; DEED, 6-9.

## PRACTICE.

1. **ATTORNEY AT LAW—AUTHORITY TO APPEAR.**—The authority of an attorney at law to appear for parties for whom he enters an appearance in an action will be presumed when nothing to the contrary appears. *Hayes v. Shattuck*, 51.
2. **VOLUNTARY APPEARANCE WAIVES ISSUANCE OF SUMMONS.**—A voluntary appearance by a defendant gives jurisdiction of his person without the issuance of any summons. This was equally the case under the Practice Act as it stood in 1855. *Id.*
3. **SETTING ASIDE EXECUTION SALE.**—When the application to set aside a voidable sale under execution should be made by motion and when by bill in equity, discussed. *San Francisco v. Pizley*, 56.
4. **SERVICE OF ATTACHMENT, EFFECT OF.**—The service upon the defendant, in an action to recover money, of a writ of attachment at the suit of a third person against the plaintiff, cannot be plead by the defendant in bar of a recovery. The only effect of the service of the attachment is to suspend the proceedings until the determination of the suit in which it is issued. *Pierson v. McCahill*, 122.
5. **REVIVAL OR ENFORCEMENT OF JUDGMENT.**—The writ of *scire facias* is a remedy unknown to our practice, and cannot be employed for the revival or enforcement of a judgment. *Humiston v. Smith*, 129.
6. **CIVIL ACTION—WHAT IT INCLUDES.**—The term "civil action" in that section of the Practice Act, providing that "there shall be in this State but one form of civil action for the enforcement, etc.," includes the remedies provided for the enforcement of judgments. *Id.*
7. **REMEDIES EXCLUSIVE.**—The system of remedies provided by our Practice Act is exclusive, and when it provides an adequate remedy no other can be pursued. *Id.*
8. **SETTING ASIDE JUDGMENT.**—In an action of ejectment against two defendants, one was served with summons and made default, and without any service being had upon the other, a judgment was entered against both for possession of the premises and costs. On application of the defendant not served, an order was made at a

subsequent term of the Court, setting aside the entire judgment as to both defendants, with leave to the defendant not served to answer: *Held*, that this order was proper. *Lewis v. Rigney*, 268..

9. *IDEM*.—The effect of such an order is not to set aside the default of the defendant who had been served, or to permit his co-defendant to defend for both. A new judgment may at once be entered by the plaintiff against the defaulting defendant. *Id*.
10. *IDEM*.—The sixty-eighth section of the Practice Act applies not only to cases where a judgment has been taken regularly without personal service, as upon publication of summons, but also to cases of judgments entered erroneously without any service of summons or appearance of defendant. *Id*.
11. DISCRETION OF COURT IN CORRECTING MISTAKE.—Where, pending a motion by a defendant who had been served with process to set aside a judgment erroneously entered at a previous term against him and a co-defendant who had made default, the plaintiff applied to the Court to correct the judgment by striking out the name of the moving defendant, on the ground that it had been inserted by a mistake of the Clerk: *Held*, that, admitting the mistake, it was within the discretion of the Court to deny so tardy an application. *Id*.
12. UNDERTAKING IN REPLEVIN, LIABILITY OF SURETIES.—The one hundred and seventy-seventh section of the Practice Act and the decisions under it, to the effect that the sureties upon the undertaking given by the plaintiff in a replevin action to procure a delivery of the property, are not responsible for a return of the property or its value unless a return was claimed in the answer and awarded by the judgment, do not apply to cases where the action is dismissed by the plaintiff before trial. *Mills v. Gleason*, 274.
13. LIABILITY OF SURETIES ON DISMISSAL OF ACTION.—The dismissal of a replevin action by the plaintiff before trial leaves the parties to settle in an action upon the undertaking those matters, including the right of defendant to a return of the property, which, had the original suit been prosecuted, must have been determined therein in the first instance. The opportunity to obtain a judgment for the return having been taken away by the failure to prosecute, defendant is entitled to recover, in an action on the undertaking, compensation in damages. *Id*.
14. *IDEM*.—Where the replevin action is dismissed before trial, the liability of the sureties on the undertaking for a return of the property is not affected by the fact, that before the dismissal an answer had been filed in which no return of the property was claimed. *Id*.
15. SUBSEQUENT ATTACHING CREDITOR, WHEN MAY INTERVENE.—In an action to recover money in which an attachment has been issued and levied upon property of the defendant, a subsequent attaching creditor may intervene at any time before the entry of judgment for the purpose of contesting the validity of the first attachment. *Speyer v. Ihmels*, 280.
16. POSTPONEMENT OF LIEN.—Action commenced by attachment to recover an alleged indebtedness, and defendants made default; before the entry of judgment, certain subsequent attaching creditors intervened and contested the validity of the plaintiff's attachment, on the ground that no debt was really due from plaintiff to defendant. On the issue thus raised the Court found in favor of the intervenors, and thereupon entered an order setting aside the attachment of plaintiff: *Held*, that the order was erroneous in entirely setting aside the plaintiff's attachment, and must be modified so as merely to postpone the plaintiff's lien to that of the intervenors. *Id*.

17. **VERBAL STIPULATIONS DISREGARDED.**—Verbal stipulations with reference to proceedings in pending actions cannot be regarded except so far as they are admitted by the parties against whom they are sought to be enforced. *Reese v. Mahoney*, 805.
  18. **OPENING DEFAULT—DILIGENCE REQUIRED.**—A defendant who, having suffered a default, has obtained from the plaintiff a stipulation that the default may be set aside, must use reasonable diligence in applying to the Court for the relief contemplated, or his right to it will be lost. An unexplained delay of seven years in making the application will justify the Court in refusing to enforce the stipulation. *Id.*
  19. **IDEM—SHOWING REQUIRED.**—An application to open a default must be accompanied by some showing of merits. In the absence of such showing it will be denied. *Id.*
  20. **ARBITRATION—WHO MAY SUBMIT TO.**—Wherever parties may by their own act transfer real property, or exercise any act of ownership with regard to it, they may refer any disputes concerning it to the decision of arbitrators, who may order the same acts to be done which the parties themselves might do by agreement. This was the rule at common law and is not altered by section three hundred and eighty of the Practice Act. *Blair v. Wallace*, 317.
  21. **SUGGESTION OF DEATH AND SUBSTITUTION OF EXECUTOR.**—Where the plaintiff in an action died before trial, and a subsequent order for judgment contained a recital as follows: "This action having been continued in consequence of the death of the plaintiff, by his executor, Samuel Webb, and the jury having found a verdict for plaintiff," and then awarded judgment in favor of the plaintiff: *Held*, that the recital sufficiently showed a suggestion of the death of the original plaintiff and a continuance or revival of the cause in the name of the executor. *Gregory v. Haynes*, 448.
  22. **SETTING ASIDE JUDGMENT ON TERMS.**—Where a motion to set aside a judgment is granted "on payment of all costs," the judgment remains in force until the costs are paid. *Id.*
  23. **COSTS.**—A failure by the opposing party to file his cost bill, or to give notice under a rule of Court allowing five days after notice for payment of the costs, would not operate to make the vacation of the judgment absolute. *Id.*
  24. **CONDITIONAL ORDER, EFFECT OF.**—After a conditional order to set aside a judgment, the Court in deciding a motion to place the cause on the calendar for trial, "orders that said motion be and the same is hereby denied, and the judgment will remain:" *Held*, that this was a distinct adjudication, that the previous order had not taken effect; and held further, that this order directing that the judgment remain, being the last in the case and not having been appealed from, it deprived of all force any previous order in reference to vacating the judgment. *Id.*
  25. **DEFAULT HOW MADE.**—An acceptance by plaintiff's attorney of service of a demurrer, filed by a defendant after his default has been entered, is a waiver of the default. *Hestres, Administrator, v. Clements*, 425.
  26. **REVIEW ON APPEAL.**—On appeal by a plaintiff from an order overruling a motion for new trial, made by him upon the ground of insufficiency of the evidence to justify the verdict, an exception taken by defendant on the trial to the competency of a witness who testified for plaintiff will not be considered. *Pierce v. Jackson*, 636.
- See—PLEADING, 1, 2; SALE, JUDICIAL, 5; APPEAL, 2, 4, 7-10, 12; ACTION, 1-4; CREDITORS, 1-5; JUDGMENT AND VERDICT, 1-4, LIMITATIONS, STATUTE OF, 6; INDICTMENT, 2, 3; UNDERTAKING, 6; EQUITY, 10, 12; LANDLORD AND TENANT, 11-13.

## PREEMPTION.

See PUBLIC LANDS.

## PRESCRIPTION.

See POSSESSION, 4; MEXICAN GRANT, 8.

## PRESUMPTION.

1. **PRESUMPTIONS AS TO MEXICAN GRANTS.**—Presumptions are only indulged to supply the absence of facts. There can be no presumption against ascertained and established facts. The presumption, therefore, of a grant from the long possession of land is repelled and destroyed by the production or proof of the instrument under which the possession was held. *Nieto v. Carpenter*, 455.

See SAN FRANCISCO, 1; EJECTMENT, 1; PROMISSORY NOTES, 2, 8; HUSBAND AND WIFE, 2; FRANCHISE, 5; OFFICE AND OFFICER, 1-3; ARBITRATION, 1; DEED, 9; MEXICAN GRANT, 5; LIMITATIONS, STATUTE OF, 8; FRAUD AND STATUTE OF FRAUDS, 7, 8; ORIGINAL LAW, 9.

## PRINCIPAL AND SURETY.

See SURETY.

## PROCESS.

See PRACTICE, 6; WRIT OF ASSISTANCE.

## PROMISSORY NOTES.

1. **NOTE GIVEN FOR DEBT, EFFECT OF.**—A note given in consideration of an antecedent indebtedness does not *per se* discharge the debt. In the absence of an agreement to the contrary, the only effect is to suspend the remedy until the maturity of the note. *Smith v. Owens*, 11.
2. **ASSIGNMENT OF NOTE TO MAKER AMOUNTS TO PAYMENT.**—An assignment of a joint and several negotiable promissory note by the payee to one of the makers before its maturity amounts to payment, and the right of action against the makers is not revived by a subsequent assignment to a third person after maturity. If the subsequent assignment were made before maturity to an innocent person, a right of action would exist in his favor against the makers. *Gordon v. Wansey*, 77.

See PLEADING, 1, 6, 7, 21; PAYMENT, 1; PARTNERSHIP, 3, 4; AGENT, 2.

## PUBLIC LANDS.

1. **RIGHT OF WAY TO RAILROADS.**—The Act of Congress of August, 1852, which gives to railroad and other companies, on complying with certain conditions, a right of way over the public lands, does not confer upon the companies availing themselves of its provisions the right to enter upon premises in the actual occupancy of a settler without compensating him for the damage done to his possession. *Cal. Northern R. R. Co. v. Gould*, 254.
2. **IDEM—PURPOSE OF ACT.**—The purpose of the Act of Congress was merely to give a right to enter upon the public lands, assuming them to be vacant, and its effect is to relinquish to the companies complying with its requirements any claim for

compensation that might belong to the United States, as proprietor, under any proceeding, by virtue of a State law, to appropriate the land for public use. *Id.*

3. **SETTLER ON PUBLIC LANDS.**—A settler upon the public lands in this State, having no other title than that of occupancy, cannot, consistently with the policy of the General Government and of the State in reference to such lands, be treated by the Courts as a naked wrong-doer. As against persons claiming a simple privilege like that conferred upon railroad companies by the Act of Congress of August, 1852, he has an equitable right to his possession and improvements which the Courts will protect. *Id.*
4. **PUBLIC LANDS SUBJECT TO LOCATION UNDER SCHOOL WARRANTS.**—The public lands of this State were, previous to their survey by the General Government, subject to location by the holders of school warrants issued under the Act of May 3d, 1852. *Van Valkenburg v. McCloud*, 330.
5. **SELECTION OF STATE LANDS.**—*Doll v. Meador*, 16 Cal. 296, affirmed upon the points that the Act of Congress of September, 1841, donating lands for internal improvements, is as to the States to be subsequently created a grant *in presenti*, and vests in each of them immediately upon its admission 500,000 acres of the Government lands within its boundaries, not reserved from sale, with the right to select the same in such manner as its Legislature may direct; that such selection may be made before the land is surveyed by the Government, but must be subject to change if subsequently, upon the survey being made, it be found to want conformity with the lines of such survey. *Id.*
6. **LOCATION BEFORE SURVEY VOID.**—C. being the holder of two school warrants issued under the State Act of May 3d, 1852, located with them, in November of that year, three hundred and twenty acres of public land, of which no survey had at that time been made by the General Government, took possession of the same and occupied it until 1857, when he conveyed the premises with the warrants to M., and he subsequently to the defendant, who took and has since retained the possession. The original selection was not strictly in conformity with the lines of the subsequently made survey of the United States, but after such survey the defendant caused its boundaries to be changed so as to conform with the lines of the sectional divisions established by the survey, and deposited his warrants in the United States Land Office of the district. The plaintiff claims under a location of other school warrants made by him upon the same land after the survey by the United States. In ejectment by plaintiff to recover the land of defendant; *Held*, that the location by C. before the Government survey was valid, and that the title of defendant should prevail. *Id.*

See EJECTMENT, 8, 11; POSSESSION, 1; MEXICAN GRANT, 6, 10, 18.

## PURCHASE AND PURCHASER.

1. **SALE OF LAND BY ATTORNEY.**—Where a purchaser, under a conveyance executed by an attorney having a power not under seal, pays the purchase money, and enters into possession, a Court of Equity will protect him, and parties claiming under him, against subsequent purchasers with notice from the grantor of the power. *Dutton v. Warschauer*, 609.
2. **POSSESSION TO PUT PURCHASER ON INQUIRY.**—Open, notorious, and exclusive possession of real estate is sufficient to put a purchaser upon inquiry as to the interest, legal or equitable, held by the possessor. *Id.*
3. **IDEM.—BY TENANT.**—Such possession by a tenant is sufficient to put the purchaser upon inquiry as to the landlord's title. *Id.*

See TRUST AND TRUSTEE, 1, 4; LIMITATIONS, STATUTE OF, 11; SALE, JUDICIAL.



## INDEX.

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### RATIFICATION.

See ESTOPPEL, 12.

### RECITAL.

See SAN FRANCISCO, 2; CONTRACT, 6; MEXICAN GRANT, 7.

### RECORDS.

See EVIDENCE, 1, 2.

### REDEMPTION.

1. **REDEMPTION BY JUNIOR MORTGAGEE.**—A junior mortgagee, not made a party to a suit for foreclosure of a prior mortgage, has the statutory right of redemption within six months from a sale made under a decree in such suit, and retains also the general equitable right of redemption which exists independent of the statute. If made a party to the foreclosure suit, his equitable right of redemption is barred, but he is still a redemptioner under the statute. *Frink v. Murphy*, 108.
2. **STATUTORY RIGHT TO REDEEM.**—Although the decree ascertains the amount of his lien and directs its payment out of any surplus proceeds of the sale remaining after satisfaction of the prior lien, his statutory right to redeem is not thereby destroyed, but still exists as to any portion of his demand not satisfied by the application of the surplus proceeds of the sale. *Id.*
3. **SUBSEQUENT LIENS.**—The phrase, "*on which the property was sold*," occurring in the two hundred and thirtieth section of the Practice Act, refers to the lien which the action was brought to enforce, and does not apply to the liens of subsequent incumbrancers who are made parties. *Id.*
4. **"MONTHS" DEFINED.**—The term "months" used in the statute fixing the period of redemption from judicial sales means calendar and not lunar months. *Gross v. Fowler*, 392.

See MORTGAGE, 8; SALE, JUDICIAL, 12; STATUTES, 3.

### REFORMATION OF INSTRUMENT.

See PRACTICE, 5.

### REPLEVIN.

See PRACTICE, 13-15.

### RES JUDICATA.

See APPEAL, 15-18; MEXICAN GRANT, 9; EQUITY, 11, 12.

### RETURN OF OFFICER.

See SALE, JUDICIAL, 10.

### RIGHT OF WAY.

See PUBLIC LANDS, 1, 3.

## INDEX.

### SALE, JUDICIAL.

1. **PROBATE SALES—TO WHAT STATUTE APPLIES.**—The provision of the act regulating the settlement of the estates of deceased persons, declaring that no sale of any property of an estate shall be valid unless made upon an order of the Probate Court, applies only to sales by executors and administrators. It has no reference to judicial sales under the decrees of the District Courts, nor to sales in pursuance of testamentary authority. *Fallon v. Buller*, 24.
2. **SALE IN MASS, INVALID.**—A sale in mass, under a writ of execution, of real estate, consisting of several known and distinct parcels, at a price greatly below the actual value of the property cannot be sustained against the objection of the judgment debtor. *San Francisco v. Pizley*, 56.
3. **IDEM—NOT VOID, BUT VOIDABLE.**—Such sales are not absolutely void, but are voidable, and will be set aside upon reasonable and proper application, when there is reasonable ground for belief that they were less beneficial to the creditor or debtor than they would have been had a different mode been pursued. *Id.*
4. **IDEM—WHEN MAY BE SET ASIDE.**—Under an execution against the city and county of San Francisco, the Sheriff sold a tract of land, belonging to the corporation, one mile in length and half a mile in width, which had, long previous to the sale, been laid out by the city authorities into blocks and streets of designated dimensions and boundaries, and marked upon the official map of the city; part of the land lay under the tide waters of the bay of San Francisco, and the dry land was intersected by a navigable stream. The property was sold in mass for three hundred and sixty dollars, and was worth at the time about \$75,000: *Held*, that upon application by the judgment debtor, the sale was properly set aside, on account of the manner in which it had been made. *Id.*
5. **FORECLOSURE SALE—REMEDY OF PURCHASER.**—When the title of a purchaser at a sale in a foreclosure suit fails on account of a defect of parties in such suit, he must seek relief by pursuing the course pointed out in *Boggs v. Hargrave*, 16 Cal. 566. *Burton v. Lies*, 87.
6. **TENANT IN POSSESSION, WHO IS.**—A person who, after the commencement of an action to foreclose a mortgage, acquires possession of the premises from one of the defendants and continues to occupy after a sale under the decree of foreclosure is a "tenant in possession," and liable as such to the purchaser for the rents and profits accruing between the sale and the execution of the Sheriff's deed. *Shores v. Scott River Co.*, 135.
7. **MANAGING AGENT NOT A TENANT IN POSSESSION.**—R. having a possessory interest in certain premises which had been sold under a foreclosure decree employed M. to manage the property, and receive all its proceeds and pay them over in certain fixed proportions to R. and S.: *Held*, that M. was a mere agent of R. and not a "tenant in possession," and, therefore, not liable to the purchaser at the sale for the rents and profits. *Id.*
8. **PURCHASER AT JUDICIAL SALE, RIGHTS OF.**—Whether the purchaser at a judicial sale can maintain an action for the rents and profits against the tenant in possession before receiving his deed from the Sheriff—*Query*. *Id.*
9. **MONEY DEPOSITED BY SHERIFF LOSES ITS IDENTITY.**—Where a Sheriff deposits, in his own name, with his banker money received from a sale by him under judicial process, its identity is lost, and it cannot be followed as a specific fund by the parties entitled to the proceeds of the sale into the hands of a third person who has drawn it from the banker upon the Sheriff's order. *Carlton v. Conroy*, 170.

## INDEX.

10. **TITLE OF PURCHASER AT SHERIFF'S SALE, ON WHAT IT RESTS.**—The title of the purchaser of real estate at execution sale does not depend upon and is not affected by the Sheriff's return upon the writ of execution. The title rests upon the judgment, execution, sale, and deed, and is not impaired by any defect in the return of the officer, or by his failure to make any return. *Clark v. Lockwood*, 220.
  11. **SHERIFF'S DEED, WHEN VOID.**—A Sheriff's deed upon a judicial sale, executed before the expiration of the statutory period of redemption, is absolutely void and not merely voidable. *Gross v. Fowler*, 392.
- See **ADMINISTRATOR AND EXECUTOR**, 1, 2; **WRIT OF ASSISTANCE**, 1-4; **OFFICE AND OFFICER**, 1, 3; **MORTGAGE**, 6.

### SALE OF PERSONAL PROPERTY.

See **CONTRACT**, 8, 9.

### SAN FRANCISCO.

1. **ALCALDE GRANTS.**—An Alcalde of San Francisco had, in 1849, authority as such to make grants of the lands of that pueblo, and the same presumptions in regard to the regularity and effect of his proceedings attach to him as to other officers. *White v. Moses*, 84.
2. **IDEM—RECITALS IN.**—Where the grant of an Alcalde recited that he made it by virtue of the authority in him vested, and in pursuance of the order of the Town Council: *Held*, that his general authority to make the grant as Alcalde was not limited by the recital, and that the grant was admissible in support of the title of the grantee without proof of any order of the Town Council. *Id.*
3. **IDEM—HOW MADE.**—A grant by an Alcalde in 1849 of pueblo lands in San Francisco, was not invalidated by the fact that it was made in pursuance of a sale at public auction by order of the Town Council. *Id.*
4. **VAN NESS ORDINANCE, PURPOSE OF.**—The Van Ness Ordinance was framed upon the theory, that the better right to the bounty of the city rested with the first possessor, provided his possession was actual, and had not been voluntarily abandoned, and such prior actual possessor is entitled to the benefits of the ordinance, notwithstanding an interruption of his possession by the intrusion or trespass of others. *Hubbard v. Barry*, 321.
5. **GRANT OF JUSTICE OF PEACE VOID.**—A Justice of the Peace of San Francisco in 1849 had no authority as such to make grants of the pueblo lands of that city, and a grant made by him is inoperative for any purpose whatever. *Id.*
6. **ORDINANCE OF CITY NULL AND VOID.**—The several cases which have been before this Court in relation to the liability of the city of San Francisco to the parties who bid off the city slip property at the attempted sale by the city authorities in December, 1853, under an alleged ordinance, designated as Ordinance No. 481, commented upon, and held to have decided and settled the following points:  
*First*—That the ordinance, so called, was never passed, and was, therefore, a nullity.  
*Second*—That the sale made in pursuance of it was, therefore, invalid and passed no title to the bidders.  
*Third*—That the bidders were entitled to recover back from the city the purchase money paid by them, and received and appropriated by the city authorities.  
*Fourth*—That they were not precluded from a recovery either: 1st, by reason of any want of privity between themselves and the city; or 2d, by the alleged subsequent adoption by the city authorities of the ordinance directing the sale; or 3d, by

reason of a subsequent alleged ratification of the sale by an appropriation of the proceeds; or 4th, by the clause in the city charter restraining the corporation from contracting liabilities beyond the sum of \$50,000; or 5th, by the Act of the Legislature of 1853, authorizing the City Treasurer to execute deeds to the purchasers on certain conditions. *Pimental v. San Francisco*, 351.

7. **INVALID SALES OF CITY SLIP PROPERTY.**—The complaint, in an action to recover back from the city of San Francisco purchase money paid upon the invalid sales of her city slip property in 1853, was filed April 21st, 1856, and alleged that one instalment of the purchase money was paid December 27th, 1853, another February 27th, 1854, and a third April 27th, 1854, and that these several payments were received by the city on the respective days of their payment. The referee to whom the case was referred found as a fact, that the several payments were made to the city and accepted by her as alleged in the complaint: *Held*, that the defense of the Statute of Limitations pleaded by the city must be sustained as to the first two instalments, and disallowed as to the third. *Id.*
8. **CONSOLIDATION ACT, EFFECT OF.**—The corporation, the City of San Francisco, was not destroyed by the Consolidation Act, but continued. Its name only was changed, and the change in this respect did not require any alteration in the pleadings or any suggestion of record in an action pending against the city at the time the act was passed. *People ex rel. Frank v. San Francisco*, 668.
9. **IDEM.**—Where an action was commenced against the City of San Francisco previous to the passage of the Consolidation Act, but judgment was not recovered until after the passage of the said act: *Held*, that the judgment was binding against the existing corporation, the City and County of San Francisco. *Id.*
10. **IDEM—INDEBTEDNESS OF CITY.**—The provision of the fourth section of the Consolidation Act, respecting the preexisting indebtedness of the city of San Francisco, was not a mere legislative declaration of good faith towards the public creditors, but a requirement imposing upon the Board of Supervisors the duty of providing for the payment of that indebtedness. *Id.*
11. **IDEM—AUTHORITY OF SUPERVISORS.**—The Board of Supervisors of the City and County of San Francisco have authority, and it is their duty to provide for the payment of judgments recovered against the city of San Francisco. They have no discretion except between two courses of procedure. They must either appropriate for this purpose money already in the treasury, or they must raise the money by taxation. *Id.*
12. **IDEM—MANDAMUS LIES.**—*Mandamus* is the appropriate remedy to enforce the performance of this duty by the Board of Supervisors. *Id.*
13. **IDEM—PASSAGE OF ORDINANCE.**—There being no discretion as to the duty to be performed there is none as to the use of the means required in performing it. If the means require the passage of an ordinance, the Supervisors have no discretion to refuse to pass the ordinance. They have not in such case the right to vote at their option either for or against the ordinance. *Id.*
14. **IDEM—AUDITING CLAIMS AGAINST CITY.**—Section ninety-five of the Consolidation Act, with reference to auditing claims, does not apply to judgments recovered upon the preexisting indebtedness of the city. *Id.*
15. **IDEM—CONSTRUCTION.**—The restrictive clauses of that section and of other sections of the act must be read in connection with the fourth section and receive such a construction that the provisions of all may stand. *Id.*
16. **IDEM—PAYMENT OF CITY INDEBTEDNESS.**—In imposing upon the Supervisors the duty of providing for the payment of the city indebtedness, the Legislature

authorized them to take all the ordinary measures essential to its complete performance. The duty carries with it the means. The Board can appropriate from the revenues or levy a tax, and the adjusting of the details is a mere matter of administration, which can be had under the direction of any of the officers of the corporation designated for that purpose. *Id.*

See EMBOWMENT, 6; STATUTES, 1, 2; LIMITATIONS, STATUTE OF, 5.

### SCHOOL WARRANTS.

See PUBLIC LANDS, 4, 6, 7.

### SCIRE FACIAS.

See PRACTICE, 6.

### SHERIFF.

See SALE, JUDICIAL, 9; EQUITY, 11, 12.

### SPECIFIC PERFORMANCE.

See EQUITY, 1-6.

### STATUTES.

1. **EFFECT OF REPEAL OF STATUTE.**—Where a contract is made and executed in pursuance of a statute, which also prescribes the parties against whom and the mode in which it may be enforced, the right to enforce it in the manner prescribed is a part of the contract, and is not affected by a subsequent act repealing the provisions in reference to the enforcement of the contracts authorized by the statute under which it was made. *Creighton v. Pragg*, 115.
2. **CONSOLIDATION ACT OF SAN FRANCISCO.**—The Consolidation Act of 1856, as amended in 1859, authorized the city authorities of San Francisco to enter into contracts with individuals for grading its streets, and provided that the charges under the contract should be borne by the owners of the adjacent lots. Section fifty-nine authorized a contractor, upon the completion of his work, to sue each delinquent owner for the amount of his assessment. In March, 1861, a contract was entered into with plaintiff for grading a certain street, and the work under it was completed by him in April. May 18th, 1861, an act was passed repealing section fifty-nine. In August, 1861, plaintiff commenced the present action against one of the delinquent owners to recover the amount assessed against him: *Held*, that plaintiff's right to maintain the action was not impaired by the Repealing Act; that the right to sue the property owners was a part of the contract, and could not be taken away by legislation subsequent to his performance of the work. *Id.*
3. **STATUTES, DEFINITION OF TERMS.**—When a term, not technical, is used in a statute it must, unless the Legislature have affixed to it a special definition, be taken in its ordinary and general sense. *Gross v. Fowler*, 392.
4. **VALIDITY OF ACT OF LEGISLATURE.**—The validity of a public act of the Legislature is in no respect impaired by the knowledge or ignorance at the time of the action of the Legislature in passing it on the part of the parties who may be affected by its operation. *Oakland v. Carpentier*, 642.

See ESTATES OF DECEASED PERSONS, 3; FRANCHISE, 7.

## INDEX.

### STATUTORY CONSTRUCTION.

*Criminal Practice Act*—Sections 213, 229, 230, 277, 278, 28, in *People v. Lawrence*, 372; Section 246, in *People v. Vance*, 408; Sections 402, 440, in *People v. Brannigan*, 338.

*Ferries and Toll Bridges*—Acts of 1850, 1855, in *Fall v. Sutter Co.*, 251.

*Forcible Entry and Detainer*—Section 13, in *Wheelock v. Warschaner*, 315.

*Husband and Wife*—Section 6, in *Coles v. Soulsby*, 51.

*Oakland*—Incorporation Acts of, in *Oakland v. Carpentier*, 662.

*Practice Act*—Section 1, in *Humiston v. Smith*, 134; Section 23, in *Hayes v. Shattuck*, 54; Section 45, in *Rowe v. Bacigalluppi*, 635; Section 46, in *Goddard v. Fulton*, 435; Sections 65, 66, in *Canfield v. Tobias*, 350; Section 68, in *Lewis v. Rigney*, 273; Sections 102, 177, in *Mills v. Gleason*, 279; Sections 223, in *San Francisco v. Pixley*, 58; Section 230, in *Frink v. Murphy*, 112; Section 254, in *Van Winkle v. Hinckle*, 343, and *Rico v. Spence*, 510; Section 336, subdivision 1, in *Adams v. Woods*, 165; Section 352, in *Whitney v. Allen*, 236; Sections 645, 659, in *Dutil v. Pacheco*, 442; Sections 659, 660, 661, in *Speyer v. Ihmels*, 286.

*Probate Act*—Sections 128, 131, 133, 134, 136, 139, 140, 145, 147, 148, 150, and 220, in *Fallon v. Butler*, 31; Section 148, in *White v. Moses*, 44.

*Railroads*—Act of Congress granting right of way, and State Laws, (Stat. 1851, 433, 1852, 172,) in *California N. R. Co. v. Gould*, 259.

*Records*—Act to supersede certain Courts, (Stat. 1850, 77,) Act for transfer of records, (Stat. 1850, 218,) Act concerning County Recorders, Section 21, (Stat. 1850, 151,) and Sections 3, 10, 21, (Stat. 1851, 199,) Act concerning Salaries of Officers, (Stat. 1850, 83,) in *Touchard v. Keyes*, 210.

*Revenue*—Section 15, of Act of 1857, in *Keane v. Cannovan*, 302.

*Roads and Highways*—Section 5, (Stat. 1855, 192,) Supervisors' Act, 1855, 51, in *Huffman v. San Joaquin Co.*, 430.

*San Francisco*—Article III., Section 5, of Charter, (Stat. 1851, 357,) in *Pimental v. San Francisco*, 364; Sections 4, 95, of the Consolidation Act, in *Frank v. San Francisco*, 695.

*School Lands*—Act of Congress of 1841, in *Van Valkenburg v. McCloud*, 335.

*Statute of Limitations*—Section 31, in *Pelía v. Vance*, 148.

*Tenants in Common*—(Stat. 1857, 62,) in *Touchard v. Keyes*, 203.

*Town Lands*—Act of Congress of 1844, in *Rhodes v. Craig*, 423.

*Van Ness Ordinance*—In *Keane v. Cannovan*, 304, and in *Hubbard v. Barry*, 323.

### SUPREME COURT.

See *APPEAL*.

### SURETY.

See *INDEMNITY*; *UNDERTAKING*, 1, 2, 7; *BOND*, 1, 2.

### TAXES.

1. *TAX DEED AS EVIDENCE*.—The statute which makes a tax deed *prima facie* evidence of the transfer of the title of the delinquent, applies only to deeds executed

## INDEX.

upon a sale for taxes levied subsequent to its passage. A tax deed executed previous to the passage of the statute, is not admissible as evidence of title without proof that all the requirements of the law authorizing its execution had been complied with. *Keane v. Cannovan*, 291.

See EJECTMENT, 5; OFFICE AND OFFICER, 1, 3; DEED, 4, 5; ABANDONMENT, 1.

### TENANTS IN COMMON.

1. **TENANT IN COMMON ENTITLED TO POSSESSION.**—One tenant in common is entitled to the possession of the entire tract held in common against all persons but his cotenants and parties claiming under them, and as a consequence can maintain against them an action for its recovery. *Hart v. Robertson*, 346.
2. **CO-TENANTS, RIGHTS OF.**—No action of a portion of several tenants in common can impair the rights of their co-tenants. *Mahoney v. Van Winkle*, 552.
3. **TENANT IN COMMON ENTITLED TO POSSESSION.**—A tenant in common of an undivided portion of a tract of land is entitled to the possession of the whole tract as against all persons, except his co-tenants, and as a consequence may, as against all others, maintain ejectment for the entire premises. *Id.*
4. **TENANT IN COMMON MAY RECOVER IN EJECTMENT.**—One tenant in common in a mining claim may, as against mere trespassers, recover in ejectment the entire claim. *Rouse v. Baciagalluppi*, 636.
5. **IDEM.**—In an action brought by several plaintiffs to recover a mining claim the answer, without alleging any misjoinder, denied plaintiffs' title and asserted an independent and better title in defendants, and the proofs showed that some of plaintiffs had no interest, and that others of them had a title superior to that of defendants as tenants in common with persons not made parties: *Held*, that those of plaintiffs thus showing title should recover of defendants the entire premises. *Id.*

See DEED, 3; HUSBAND AND WIFE, 4; PARTIES, 4.

### TENDER.

See EQUITY, 6.

### TRADE MARK.

See EQUITY, 7, 8.

### TRANSFER OF ACTION.

See CRIMINAL LAW, 1, 3.

### TRUST AND TRUSTEE.

1. **TRUST.**—Where a conveyance of land is executed to one person and the purchase money is paid by another, the grantee holds the land in trust for the person who pays the consideration. *Hidden v. Jordan*, 92.
2. **RESULTING TRUST.**—Where a part of the purchase money of land is paid by a person other than the grantee, and no agreement is shown between the grantee and such person, a trust results in favor of the latter for an interest in the land proportioned to his share of the purchase money. *Id.*

3. **RESULTING TRUST—PROOF OF VERBAL AGREEMENT.**—Although a verbal agreement by A to purchase land for B may not be given in evidence to establish a resulting trust where the entire purchase money has been paid by A and the conveyance taken in his name, yet, if any part of the purchase money is shown to have been paid by B, a verbal agreement may then be proved which shall have the effect to deprive A of all beneficial interest in the purchase, and to clothe the entire estate in his hands with a trust in favor of B. *Id.*
4. **RESULTING TRUST—PROOF OF VERBAL AGREEMENT.**—H., being desirous of purchasing a certain farm, agreed verbally with J. that the purchase should be made by and in the name of J., and the conveyance taken to him; that H. should furnish a portion of the purchase money, and that the balance should be advanced by J. and within a certain time repaid to him with interest by H., upon which J. should convey the title to H. H. having furnished the portion of the purchase money as agreed, J. made the purchase, paid the whole price and took a deed in his own name. In an action by H. to compel J. to execute a conveyance to him: *Held*, that the verbal agreement might be proved for the purpose of showing a resulting trust in favor of H., and that the effect of the transaction was to make J. a mere trustee of H. as to the entire property, holding the legal title as security for the repayment of his advances. *Id.*

See EJECTMENT, 2; MORTGAGE, 12; MEXICAN GRANT, 7.

### UNDERTAKING.

1. **UNDERTAKING ON APPEAL, EFFECT OF.**—An undertaking on appeal conditioned for the payment of what the judgment creditor has no legal right to receive is not, as to such condition, binding upon the sureties. *Whitney v. Allen*, 233.
2. **UNDERTAKING—LIABILITY OF SURETIES.**—Plaintiff obtained a judgment foreclosing a mortgage against B., the mortgagor, who was in possession, from which B. appealed, and to perfect the appeal and stay proceedings gave an undertaking, with defendants as sureties, conditioned, among other things, that if the judgment should be affirmed, B. would pay to plaintiff the value of the use and occupation of the premises pending the appeal. The judgment having been affirmed, and no sale of the property having been made, the present action was brought against the sureties to recover the value of the use and occupation between the date of the undertaking and the affirmance of the judgment: *Held*, that the undertaking, in reference to use and occupation, was not required by the statute, and that the sureties were, therefore, not liable. *Id.*
3. **UNDERTAKING IN REPLEVIN, LIABILITY OF SURETIES.**—The one hundred and seventy-seventh section of the Practice Act and the decisions under it, to the effect that the sureties upon the undertaking given by the plaintiff in a replevin action to procure a delivery of the property, are not responsible for a return of the property or its value unless a return was claimed in the answer and awarded by the judgment, do not apply to cases where the action is dismissed by the plaintiff before trial. *Mills v. Gleason*, 274.
4. **LIABILITY OF SURETIES ON DISMISSAL OF ACTION.**—The dismissal of a replevin action by the plaintiff before trial leaves the parties to settle in an action upon the undertaking those matters, including the right of defendant to a return of the property, which, had the original suit been prosecuted, must have been determined therein in the first instance. The opportunity to obtain a judgment for the return having been taken away by the failure to prosecute, defendant is entitled to recover, in an action on the undertaking, compensation in damages. *Id.*



## INDEX.

5. **JUSTIFICATION WHEN VOID.**—A justification by the sureties upon an undertaking on appeal to the Supreme Court made before a County Judge of a county other than that where the judgment was rendered, is not effectual for any purpose. *Tevis v. O'Connell*, 512.
6. **REINSTATEMENT OF APPEAL.**—Where a motion to reinstate an appeal was opposed on the ground that the undertaking on appeal was invalid, and after argument and submission, was denied on this ground: *Held*, that it was then too late for appellant to offer to file a new undertaking. The offer should have been made before the motion was submitted. *Id.*
7. **BOND, CONSTRUCTION OF.**—A bond in the following form: Know all men that we, A, as principal, and B, C, and D, as sureties, are bound unto the people in the several sums affixed to our names, viz.: B in the sum of ten thousand dollars; C in the sum of five thousand dollars; D in the sum of three thousand dollars, etc., etc.—“for the which payment well and truly to be made we severally bind ourselves, our heirs,” etc.—and signed and sealed by the obligors, is held to be an instrument embracing several distinct obligations, each of which is a joint obligation of the principal and one surety, and not joint and several. *People v. Hartley*, 585.

### USE AND OCCUPATION.

See MORTGAGE, 11.

### VAN NESS ORDINANCE.

See SAN FRANCISCO, 4; EJECTMENT, 6.

### VENDOR AND VENDEE.

1. **PARTIES IN SUIT FOR PURCHASE MONEY OF LAND.**—Where a vendor of land contracts with the vendee that he will pay off a mortgage previously executed by him upon the property, the mortgagee is not a necessary party to a suit for the purchase money brought by the vendor before the mortgage is discharged. A judgment, in such case, retaining the purchase money under the control of the Court until the mortgage is satisfied, is sufficiently favorable to the defendant. *Leese v. Sherwood*, 151.
2. **VENDOR'S LIEN NOT ASSIGNABLE.**—The equitable lien which a vendor of real estate, after an absolute conveyance, retains upon the property for the unpaid purchase money is not assignable. *Baum v. Grigsby*, 172.
3. **IDEM.**—This lien is not a specific absolute charge upon the property, but merely a personal privilege of the vendor, and does not pass by a transfer of his claim for the purchase money. *Id.*
4. **VENDOR'S LIEN, HOW WAIVED.**—The lien of the vendor is not waived, in the absence of express agreement to that effect, by the taking of the note or other personal security of the vendee for the purchase money; but is waived by the taking of a distinct and independent security, unless there is at the time an express agreement for its retention. *Id.*
5. **VENDOR'S LIEN, HOW DISTINGUISHED.**—The distinction between the lien of a vendor after absolute conveyance and the lien of a vendor when the contract of sale is unexecuted, stated. In the latter case, the vendor holds the legal estate as security for the purchase money, and can assign his contract with the conveyance of the title, and in that event his assignee acquires the same rights and is subject to the

## INDEX.

same liabilities as himself. In the former case, the vendor retains a mere equity, which, to become of any force or effect, must be established by the decree of the Court. *Id.*

6. **VENDOR'S LIEN NOT ASSIGNABLE.**—A vendor's lien is not assignable. *Baum v. Grigby*, ante 172, affirmed on this point. *Lewis v. Covillaud*, 178.
7. **VENDOR'S LIEN.**—A vendor's lien, after absolute conveyance, is not a specific absolute charge upon the property, but only an equitable right of the vendor to resort to it in case the purchase money is not paid. *Williams v. Young*, 227.
8. **VENDOR'S LIEN NOT ASSIGNABLE.**—It is a right which can only be asserted by one who has parted with his property. It is the personal privilege of the vendor, given solely for his security, and is in its nature unassignable. *Baum v. Grigby*, infra 172, affirmed. *Id.*

### VERDICT.

See **JUROR AND VERDICT.**

### WAIVER.

See **PLEADING, 12; PRACTICE, 28.**

### WASTE.

See **MORTGAGE, 11.**

### WATER RIGHT.

1. **DIVERSION OF WATER WHEN NOT AN APPROPRIATION.**—The diversion of the waters of a stream with the object of drainage simply, or without the intention of applying them to some useful purpose, does not constitute an appropriation. *McKinney v. Smith*, 374.
2. **APPROPRIATION OF WATER LIMITED.**—The taking up of the waters of a stream for a special limited purpose is an appropriation of only so much of the water as is necessary for that particular purpose. The surplus may be the subject of a new appropriation, which will give to the second locator a paramount right to the use of all the waters of the stream not required for the specific purpose of the first appropriation. *Id.*
3. **PRIOR RIGHT TO WATER LIMITED.**—Plaintiffs constructed a dam across Clear Creek and dug a ditch for some distance along its bank, by means of which all the waters of the stream were diverted and returned to the creek at a point half a mile below. The object of the diversion was to drain the channel of the stream below the dam and supply water for working a tract of mining claims owned by plaintiffs in the bed of the stream. Subsequently defendants dug a ditch at a point above, through which they diverted the waters of the same stream for general mining purposes. Still later plaintiffs extended their ditch to other mining points and to agricultural land below, and used the water for mining and irrigating at these latter places. In an action by plaintiffs to recover for injuries occasioned by the diversion of defendants to the use of the water at the latter points to which plaintiffs' ditch had been extended: *Held*, that the prior right of plaintiffs was limited to the use of the water for working their original claims in the bed of the stream; that as to the surplus above what was required for that particular purpose, defendants' right was paramount; and that plaintiffs could not recover. *Id.*

See **EVIDENCE, 6.**

## INDEX.

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### WILL.

SEE ADMINISTRATOR AND EXECUTOR, 2.

### WITNESS.

SEE CRIMINAL LAW, 5; EVIDENCE, 5.

### WRIT OF ASSISTANCE.

1. **WRIT OF ASSISTANCE, WHEN TO ISSUE.**—A writ of assistance can only issue against the defendants in the suit, and parties holding under them who are bound by the decree. *Burton v. Lias*, 87.
2. **WRIT OF ASSISTANCE, WHEN DENIED.**—L., a married man, purchased certain real estate, subject to a mortgage thereon, which had been previously executed by his grantor, and soon afterwards died. The mortgagee commenced an action to foreclose the mortgage, making the executors of L., but not the widow, a party, and after a decree of foreclosure and sale and expiration of the time of redemption, received the Sheriff's deed, (himself being the purchaser,) and thereupon applied to the Court for a writ of assistance against the widow, who retained possession of a portion of the premises, which on demand she refused to surrender: *Held*, on appeal from an order denying the writ, that the denial was proper; that the estate conveyed to L. became thereby the common property of himself and wife; that upon his death the title to one-half of this property vested in her, subject only to the mortgage and the lien for the payment of debts; that this title was not affected by the proceedings in the foreclosure suit to which she was not a party; and that not being bound by the decree, a writ of assistance could not be issued against her. *Id.*
3. **WRIT OF ASSISTANCE, WHEN GRANTED.**—The purchaser at a sale under a decree of foreclosure of a mortgage is entitled to a writ of assistance, although the decree in the foreclosure action contains no direction to deliver the possession, and although at the time of the application no preliminary order for such delivery of possession has been made by the Court. *Montgomery v. Middlemiss*, 108.
4. **WRIT OF ASSISTANCE, WHAT REQUISITE TO OBTAIN.**—All that is requisite to obtain the writ as against the parties, and those claiming with notice under them after the commencement of the action, is to furnish to the Court proper evidence of a presentation of the deed to them, and a demand of the possession, and their refusal to surrender it. *Id.*

SEE MORTGAGE, 6, 7.

## CASES NOT REPORTED.

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### AFFIRMED.

OCTOBER TERM, 1862.

*Anderson v. Sonoma County; California N. R. R. Co. v. Southworth; Edwards v. Johnson; Eureka Lake Co. v. Van Hagen; People v. Ah Yet.*

JANUARY TERM, 1863.

*Davis v. Estudillo; People v. Greer; People v. Ferguson; People v. Watson; Lumbert v. Hoad; Rogers v. King; People v. Leach.*

### REVERSED.

OCTOBER TERM, 1862.

*Thompson v. Moore; People v. Hicks.*

JUNE TERM, 1863.

*Cook v. De La Guerra; Hadley v. Jones; San Francisco v. Crane; San Francisco v. Grogan; People v. Clark; Volavacencio v. Falque.*













